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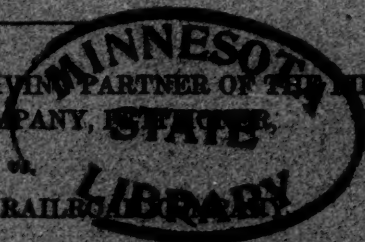
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 434.

MARY E. MEEKER, SURVIVING PARTNER OF THE FIRM
OF MEEKER & COMPANY, ESTATE,

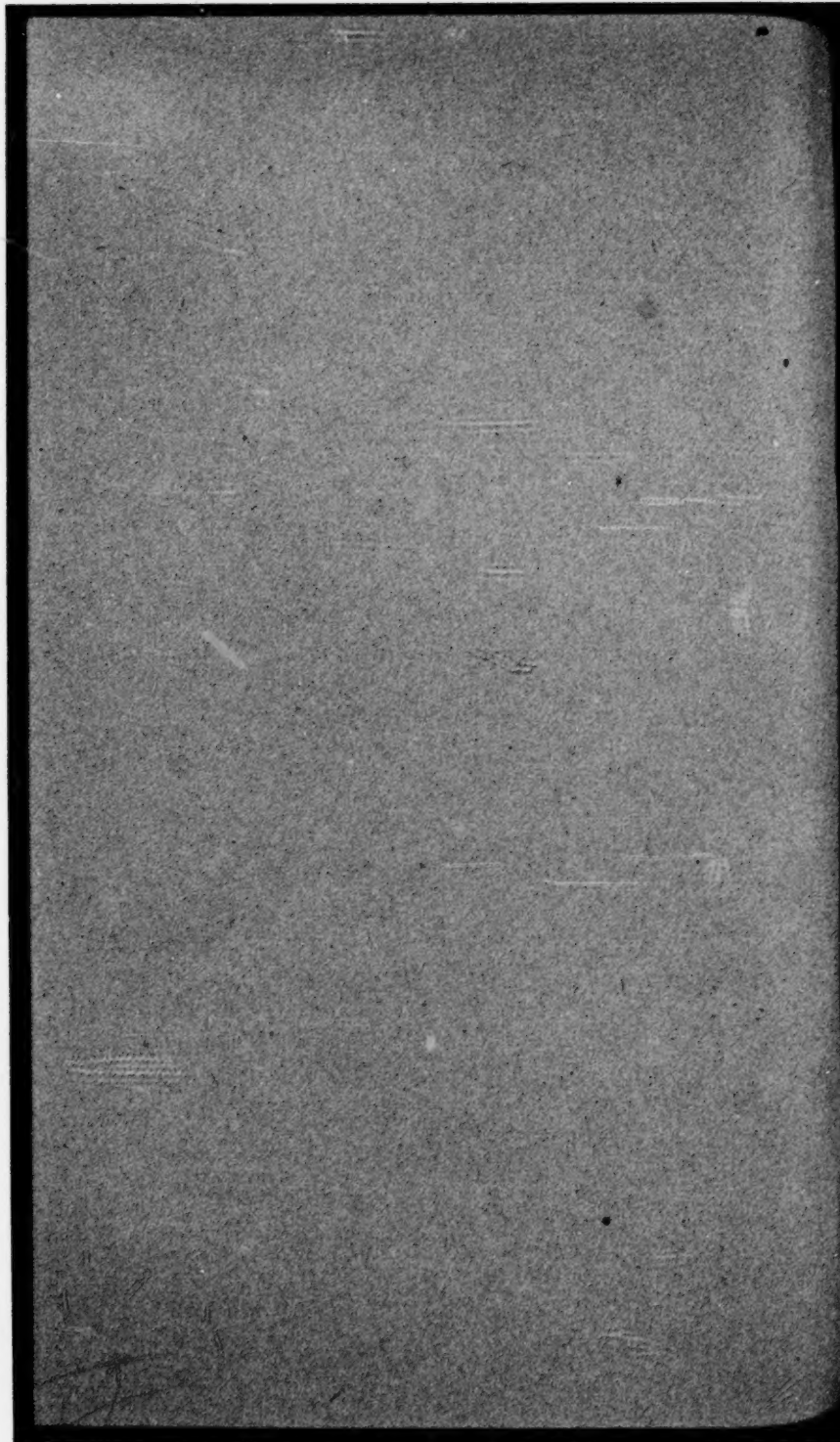
LEHIGH VALLEY RAILROAD



ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 8, 1914.
CERTIORARI AND RETURN FILED MAY 6, 1914.

(24,151)



(24,151)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 434.

HENRY E. MEEKER, SURVIVING PARTNER OF THE FIRM
OF MEEKER & COMPANY, PETITIONER,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

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Original. Print

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Transcript of Record.

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff-in-Error,
vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E.
Meeker and Caroline H. Meeker, Doing Business under the Trade
Name of Meeker & Company, Defendant-in-Error.

In Error to the District Court of the United States for the Eastern
District of Pennsylvania.

Docket Entries.

September Session, 1912.

2146.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E.
Meeker and Caroline H. Meeker, Doing Business under the Trade
Name of Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

John A. Garver, Wm. A. Glasgow, Jr.
Edgar H. Boles, John G. Johnson.

- 1912, September 3. Petition filed.
Order directing defendant to plead, answer
or demur in twenty days filed.
- " " 4. Proof of service of copy of order to plead, etc.,
filed.
- " October 5. Plea filed.
- " " 8. Order to place case on trial list filed.
- " " 23. Order for the appearance of Edgar H. Boles
and John G. Johnson, Esquires, for defend-
ant filed.
- " Nov. 11. Jury called.
- " " 12. Verdict for plaintiff, One Hundred and Nine
Thousand Two Hundred and Eighty and
17-100 (\$109,280.17) Dollars.
- " " 14. Plaintiff's bill of costs filed.
Defendant's motion and reasons for new trial
filed.

- “ Dec. 19. Argued sur motion for new trial.
Order refusing motion for new trial and directing allowance of counsel fees filed.
Præcipe for judgment filed. Judgment accordingly.
Judgment filed.
- “ “ 30. Bill of Exceptions filed.
Assignments of error filed.
Petition for writ of error filed.
Order allowing petition for writ of error filed.
Bond sur writ of error in sum of Two Hundred and Eighteen Thousand Four Hundred and Sixty and 34-100 Dollars (\$218,460.34) filed.
Order approving bond sur writ of error filed.
Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
- “ “ 30. Citation allowed and issued.
Stipulation for record sur writ of error filed.
- 1913, January 3. Citation returned, service accepted and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

3 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Henry Eugene Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, plaintiffs, and Lehigh Valley Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Lehigh Valley Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable James B. Holland, Judge of the United

States District Court at Philadelphia, the 30th day of December, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

GEORGE BRODBECK,
*Deputy Clerk of the District Court
of the United States.*

Before Holland, J.

Allowed:

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

4 In the District Court of the United States for the Eastern District of Pennsylvania, September Sessions, 1912.

No. 2146.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker & Company, Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, Defendant.

Petition.

Filed Sept. 3, 1912.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioner, Henry E. Meeker, respectfully petitioning, shows your Honors:

I.

Your petitioner is lawfully and rightfully entitled to receive and does hereby claim of the Lehigh Valley Railroad Company, the defendant above named, the sum of Eleven Thousand and Nine Dollars and Thirty-three Cents (\$11,009.33), with interest at six per cent. (6%) per annum from August 1, 1901, to August 1, 1912, amounting to Seven Thousand Two Hundred and Sixty-six Dollars and Sixteen Cents (\$7,266.16), amounting to Eighteen Thousand Two Hundred and Seventy-five Dollars and Forty-nine Cents (\$18,275.49), in the aggregate, with legal interest from August 1, 1912; also the sum of Fifty-eight Thousand Two Hundred and Thirty-six Dollars and Forty-five Cents (\$58,236.45), with interest on the various individual charges comprising said sum at the rate of six per cent. (6%) per annum from the dates of payment thereof to September 1, 1911, amounting to Twenty-seven Thousand Seven Hundred and Fifty Dollars and Sixty-four Cents

(\$27,750.64), and legal interest at six per cent. (6%) per annum upon the sum of Fifty-eight Thousand Two Hundred and Thirty-six Dollars and Forty-five Cents (\$58,236.45), from September 1, 1911, to August 1, 1912, amounting to Three Thousand Two Hundred and Three Dollars (\$3,203.00), with legal interest at six per cent. (6%) per annum, from August 1, 1912, being an aggregate sum of Eighty-nine Thousand One Hundred and Ninety Dollars and Nine Cents (\$89,190.09), with legal interest on the same at six per cent. (6%) per annum from August 1, 1912, as and for damages and reparation, in accordance with a report and order of the Interstate Commerce Commission, dated May 7th, 1912, Docket No. 1180, Opinion No. 1880, a copy whereof is hereto attached, and prayed to be made and read as a part hereof, marked "Exhibit A" as amended by a subsequent order of the Commission of date June 15, 1912, a copy whereof is hereto appended and made a part hereof and marked "Exhibit B," and in accordance with the several acts of Congress in such case made and provided; and the petitioner shows that the defendant justly and legally owes to petitioner the sum above set forth, together with legal interest from the dates aforesaid and a reasonable attorney's fee to be taxed as part of the costs against the defendant.

II.

The petitioner is a citizen and resident of the City of New York, State of New York, and is the surviving partner of the firm of Meeker & Company, of which petitioner and Caroline H. Meeker, now deceased, were formerly partners, the said Caroline H. Meeker having died pending the determination of the original complaint filed in this case before the Interstate Commerce Commission, and your petitioner having been duly and properly substituted on the record as such surviving partner.

Prior to all the dates and during all the periods of time named in this petition, the firm of your petitioner and Caroline H. Meeker under the firm name of Meeker & Company, was engaged in the business of buying, selling and shipping anthracite coal. The said business involved the shipping of large quantities of anthracite coals over the lines operated by the defendant, from mines and collieries situated in what is called the Wyoming coal region of Pennsylvania, to tidewater at Perth Amboy, New Jersey, and thence to the New York market.

At all the times herein mentioned the defendant was and still is a railroad corporation, organized and existing under the laws of the State of Pennsylvania, having its principal operating office in the State of Pennsylvania and the Eastern Judicial District of Pennsylvania, and its road runs through the Eastern Judicial District of Pennsylvania, and is a common carrier engaged in interstate railroad transportation of passengers and property between points in the States of Pennsylvania, New Jersey and New York, over its own lines of road, as well as over other lines owned, leased, controlled or operated by it.

III.

In addition to the petitioner, there have been a number of other shippers engaged in shipping anthracite coal, as interstate commerce, over the said lines operated by the defendant from mines and collieries situated in the said Wyoming coal region to tide-water at Perth Amboy, one of whom was and still is the
7 Lehigh Valley Coal Company, a corporation organized and existing under the laws of the State of Pennsylvania and engaged in the business of mining and buying anthracite coal, at mines and collieries in the said Wyoming coal region, and shipping the same, as interstate commerce, over the lines of the defendant, to tide-water, at Perth Amboy, New Jersey, and there selling it. Since the incorporation of said coal company, and during the period covered by this petition, the defendant owned or controlled its entire capital stock, and the two companies had virtually the same officers; and at least 75 per cent. of the anthracite coal transported by the defendant during the period covered by this petition was owned by said coal company.

From November 1, 1900, to August 1, 1901, the defendant, intending and purposing to unjustly and unreasonably discriminate in favor of and to prefer the Lehigh Valley Coal Company, of the stock of which company defendant was owner as aforesaid, to the petitioner and other independent shippers, charged the petitioner on all shipments of anthracite coal between the Wyoming coal region of Pennsylvania and Perth Amboy, New Jersey, rates in excess of the rates charged the Lehigh Valley Coal Company for shipments of anthracite coal over the same route between the same points, which said rates charged petitioner were unjustly discriminatory, and unjust and unreasonable, in violation of Sections 2 and 3 and Section 1, of the Act to Regulate Commerce, to the extent that they exceeded the rates charged the Lehigh Valley Coal Company on shipments of the same commodity between the same points of origin and destination, as was adjudged by the Interstate Commerce Commission in its reports and opinions, Docket No. 1180, Opinion No. 1585, filed June 8, 1911, hereto appended and made a part hereof and marked "Exhibit C," and Docket No. 1880, filed May 7, 1912, hereto ap-
8 pended and made a part hereof and marked "Exhibit A," resulting in a total discrimination against petitioner during the period from November 1, 1900, to August 1, 1901, as appears in report and order No. 1880, aforesaid, "Exhibit A," attached, and the Supplementary Order of June 15, 1912, "Exhibit B" attached.

During the period from November 1, 1900, to August 1, 1901, petitioner was unlawfully charged by defendant excessive and discriminatory rates upon 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of pea coal, 11,448.93 tons of buckwheat coal and 4,926.77 tons of rice coal, shipped between the Wyoming coal region of Pennsylvania and Perth Amboy, New Jersey, the total charges paid on such coal amounting to One Hundred and Twenty-nine Thousand Nine Hundred and Eighty-nine Dollars and Eighteen Cents (\$129,989.18), at the unjustly discriminatory rates charged petitioner, whereas had petitioner been given the benefit of the rates

applied by defendant to similar shipments of the Lehigh Valley Coal Company, the total charge upon such shipments would have been One Hundred and Eighteen Thousand Nine Hundred and Seventy-nine Dollars and Eighty-five Cents (\$118,979.85), whereby defendant unlawfully and unjustly exacted from petitioner the sum of Eleven Thousand and Nine Dollars and Thirty-three Cents (\$11,009.33), during the period aforesaid, which sum, with interest thereon from August 1, 1901, was fixed and awarded by the Interstate Commerce Commission in favor of petitioner in their report, Opinion No. 1880, "Exhibit A," aforesaid, and in their Order thereto attached, and their supplemental order, Docket No. 1180, issued on June 15, 1912, hereto attached and made a part hereof and marked "Exhibit B."

IV.

From August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner over its said line from the said Wyoming coal region to tidewater at Perth Amboy, New Jersey, the following unjust, unreasonable and excessive charges, upon all shipments of anthracite coal over said line, to wit: \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal and \$1.10 per ton for coal smaller than buckwheat coal, which charges were continued in effect from August 1, 1901, to and after July 1, 1907, and constituted unjust, unreasonable, unlawful, excessive and unjustly discriminatory charges for such transportation by defendant.

From August 1, 1901, to July 1, 1907, petitioner shipped over the lines of the defendant from the breakers at the mines and collieries in the Wyoming coal region to tidewater at Perth Amboy, New Jersey, 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and paid charges thereon amounting to Six Hundred and Eighty-five Thousand Three Hundred and Seventy-five Dollars and Twenty-seven Cents (\$685,375.27), at rates exceeding \$1.40 per gross ton on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat coal, which are the prices fixed by the Interstate Commerce Commission as proper and reasonable, and has paid charges thereon at rates in excess of those fixed as reasonable and proper by the Interstate Commerce Commission as aforesaid, the amount of such excess being Fifty-eight Thousand Two Hundred and Thirty-six Dollars and Forty-five Cents (\$58,236.45), paid by petitioner for defendant over and above the proper and reasonable charges for the same transportation under the rates fixed as aforesaid, as set forth in the Report and Award of the Interstate Commerce Commission, No. 1880, "Exhibit A" attached, and included in the award of the Interstate Commerce Commission, "Exhibit B" hereto attached.

The petitioner's firm was unable to continue its shipments of anthracite coal except by complying with the demands of the defendant as to rates; and all its said payments were made under duress; and in each and every case the said payments were made under protest, petitioner asserting that the rates charged were unreasonable and excessive, and notifying the defendant that the

right to recover back from it the amount of excess over the reasonable rate was reserved.

V.

The petitioner, on July 17, 1907, filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices and charges of defendant, to the prejudice of petitioner and in violation of the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory and supplementary thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Interstate Commerce Commission make an order requiring defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line from the Wyoming coal region to tidewater at Perth Amboy, New Jersey, and awarding complainants reparation in damages in such an amount as they might have suffered loss by reason of said improper practices and charges. Defendant being duly served with a copy of said complaint, made answer thereto; issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and a finding resulted, duly filed and reported by the Interstate Commerce Commission, at a general session at its offices in Washington, D. C., on June 8th, 1911, on Docket No. 1180, Opinion No. 1585, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and made a part hereof,

and filed and marked as "Exhibit C." with this petition. By 11 such finding the Interstate Commerce Commission held that the practices and charges of defendant complained of were unjust and unreasonable, and ordered that they be discontinued, and fixed the reasonable and proper charge for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid (at \$1.40 per gross ton on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat coal), and held that the complainants were entitled to recover all payments made over and above such just and reasonable charges. On May 7, 1912, a petition for rehearing filed by defendant was, at a general session of the Interstate Commerce Commission, after hearing, dismissed.

VI.

After the filing of briefs by all parties and oral argument had at a general session of the Interstate Commerce Commission, upon the question of reparation, there resulted a further finding, regularly and properly made by the Interstate Commerce Commission, on May 7, 1912, Docket No. 1180, Opinion No. 1880, ordering the defendant to make reparation to your petitioner, as in paragraph I of this petition above set forth, and as fully appears in the copy of said report, conclusions and order of the Interstate Commerce Commission, a copy whereof is hereto attached, marked "Exhibit A," and made a part of this petition. The order appended to said report and findings was on June 15, 1912, at a general session of the Commission, amended as appears by a copy of said amended order, hereto attached and made a part hereof, and marked "Exhibit B."

VII.

Petitioner avers that a true copy of the aforesaid order of the Interstate Commerce Commission, dated May 7, 1912, Docket No. 1180, Opinion No. 1880, and the amendment of said order of date

12 June 15, 1912, were duly served upon defendant in the above entitled cause, and demand made that defendant pay petitioner the sum claimed in this petition, and as set forth in the aforesaid orders of the Interstate Commerce Commission, "Exhibit A," and "Exhibit B" hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf, to petitioner or any one on his behalf. Wherefore petitioner has instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory or supplementary thereto.

Wherefore, the said petitioner, Henry E. Meeker, respectfully prays:

First. That your Honorable Court enter a rule and order upon the said defendant, the Lehigh Valley Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second. That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce, aforesaid.

Third. That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth. That your Honorable Court will enter judgment in favor of petitioner and against the said defendant, the Lehigh Valley Railroad Company, for the sum of One Hundred and Seven Thousand Four Hundred and Sixty-five Dollars and Fifty-eight

13 Cents (\$107,465.58), being the aggregate of the sum of Eighteen Thousand Two Hundred and Seventy-five Dollars and Forty-nine Cents (\$18,275.49), and the sum of Eighty-nine Thousand One Hundred and Ninety-Dollars and Nine Cents (\$89,190.09), together with legal interest from August 1, 1912, and costs, including a reasonable attorney's fee.

Fifth. That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioner, as in duty bound, will ever pray, etc.

HENRY E. MEEKER,
Surviving Partner.

STATE OF NEW YORK,
County of New York, ss:

Henry E. Meeker, being duly sworn, deposes and says that he is the petitioner in the above entitled cause, and that the facts set forth

in the foregoing petition are true and correct, to the best of his knowledge, information and belief.

HENRY E. MEEKER.

Sworn and subscribed to before me this 30th day of August, A. D. 1912.

[SEAL.]

_____,
Notary Public.

Notary Public, Kings County, No. 1. Certificate filed in New York County No. 1. King's County Register's No. 2529. New York County Register's No. 4028. Commission expires March 30, 1914. Customs Notary.

14

No. 11187.

STATE OF NEW YORK,

County of New York, ss:

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That Henry J. Dorgeloh has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 31st day of August, 1912.

WILLIAM F. SCHNEIDER, *Clerk.*

"EXHIBIT A."

Opinion No. 1880.

Interstate Commerce Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners,
Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 3235.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners,
Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 3235.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Submitted February 27, 1912; Decided May 7, 1912.

Reparation awarded on account of unreasonable and discriminatory rates charged for the transportation of anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy, N. J., in accordance with the conclusions announced in Meeker vs. L. V. R. R. Co., 21 I. C. C., 129.

16

William A. Glasgow, Jr., for complainants.

Frank H. Platt, George W. Field and E. H. Boles, for defendant.

Supplemental Report of the Commission.

McCHORD, Commissioner:

The original report in No. 1180, 21 I. C. C., 129, disposed of all the questions at issue except the claim for reparation, and the case was held open for the purpose of securing further information re-

garding that feature. A further hearing has been held, and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct.

In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory, in violation of section 2 of the act to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat.

On basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1,

1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911.

With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the Commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation upon

18 shipments which moved between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report.

In No. 1180 the complaint attacked the reasonableness of rates charged by defendant for the transportation of various sizes of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., and asked reparation. On June 8, 1911, the Commission rendered its decision in that case. The petition in the present case was filed on April 13, 1910, or about a year prior to our decision in No. 1180. As before stated, it attacks the same rates that were found unreasonable in No. 1180, and asks reparation on shipments moving from July 17, 1907, to April 13, 1910.

The former case was filed with the Commission within one year from the passage of the law of June 29, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is, therefore, subject to the two-year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case must be denied.

On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth, 46,772.02 tons of coal of 19 prepared sizes, 26,972.06 tons of pea coal and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to \$136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and \$125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60, with interest amounting to \$1,526.53 upon the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911.

The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved.

Orders will be issued in accordance with the findings herein announced.

Orders.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 7th Day of May, A. D. 1912.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

20 This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent. per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

HENRY E. MEEKER

v.

LEHIGH VALLEY RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$10,813.60, with interest at the rate of 6 per cent. per annum, amounting to \$1,526.53 upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 1, together with interest at the rate of 6 per cent. per annum on said sum of \$10,813.60 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

By the Commission.

[SEAL.]

JOHN H. MARBLE, *Secretary.*

At a General Sessions of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 15th Day of June, A. D. 1912.

Charles A. Prouty, Judson C. Clements, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Supplemental Order.

Upon further consideration of the record in the above entitled case, It is Ordered, That the order heretofore entered in this case on

the 7th day of May, 1912, be and the same is hereby amended so as to read as follows:

It is Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of \$11,009.33, with interest thereon, at the rate of 6 per cent. per annum, from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

It is Further Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent. per annum on said sum of \$58,236.45, from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

By the Commission:

[SEAL.]

JOHN H. MARBLE, *Secretary.*

Opinion No. 1585.

Before the Interstate Commerce Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Decided June 8, 1911.

Report and Order of the Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Submitted May 15, 1911. Decided June 8, 1911.

1. Upon shipments of anthracite coal made by complainants from the Wyoming region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, the rates collected by defendant were unjustly discriminatory and resulted in damage to complainant, for which reparation will be awarded.
2. Defendant's present rates for the transportation of anthracite coal in carloads from the Wyoming region in Pennsylvania to Perth Amboy, N. J., of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20 on buckwheat coal, found unreasonable to the extent that they exceed \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat coal, which latter rates are established as maxima for the future, reparation to be awarded on basis of the latter rates as to shipments made by complainants since August 1, 1901.

William A. Glasgow, Jr., and John A. Garver for complainants.
J. F. Schaperkotter, Frank H. Platt and George W. Field for defendant.

Report of the Commission.

McCHORD, *Commissioner*:

Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, complainants in this proceeding, were, when

the complaint was filed, engaged in the business of buying, shipping and selling anthracite coal over the lines of the Lehigh Valley Railroad Company from mines and collieries situated in the Wyoming coal region of Pennsylvania to tidewater at Perth Amboy, N. J., and thence to the New York market.

During the pendency of the proceeding Caroline H. Meeker died, and it has been continued to be prosecuted in the name of the surviving partner, Henry E. Meeker.

Complainants were not mine operators, but merely dealers on the New York market. The coal shipped by them to Perth Amboy was purchased from the Stevens Colliery, which is situated near the city of Wilkes-Barre, Pa., on the West Pittston branch of defendant's Wyoming Division, 1.5 miles from Coxton and 165 miles from Perth Amboy.

26 Practically all the anthracite coal deposits in the United States are in nine counties in the eastern portion of Pennsylvania, in an area comprising about 496 square miles. The different coal fields are as follows: The northern, commonly called the Wyoming, from which the shipments involved in this proceeding were made; the eastern middle and western middle, which together are known as the Lehigh regions, and the southern, which also bears the name of Schuylkill. All three regions are reached by the Lehigh Valley Railroad. The northern field is some 55 miles in length, has a maximum width of about 5 miles, and lies northwesterly of the Pocono Mountains, in the valley of the Lackawanna and Susquehanna Rivers. From this valley the carriers find comparatively easy outlets to points north and west, along the rivers mentioned, but coal shipped to the east over defendant's line has to be carried over the mountains at a maximum elevation of 1,750 feet. The lowest portions of the valley are about 500 feet above the level of the sea.

The coal mines are usually located at points separated from carrier's main tracks by distances varying from a fraction of a mile to several miles, and connected with such tracks by lateral lines called branches or spurs. These branches are sometimes constructed by the mine operators, but generally by the carriers. The manner in which the coal is handled at the mine openings and while in process of transportation is as follows: For convenience in handling the coal at the mouths of the mines and preparing it for market, buildings called "breakers" are erected, and in these buildings the large lumps are broken and the coal separated into required sizes by being run over a series of screens of appropriate mesh. Some lump coal is taken as it comes out of the mine and is marketed for use either in furnaces or locomotives, but the demand for this size is limited. The sizes usually transported are the following:

27 Broken or grate, which goes through a mesh 4 inches square and over a mesh $2\frac{3}{4}$ inches square.

Egg, which goes through a mesh $2\frac{3}{4}$ inches square and over a mesh 2 inches square.

Stove, which goes through a mesh 2 inches square and over a mesh $1\frac{3}{8}$ inches square.

Chestnut, which goes through a mesh $1\frac{3}{8}$ inches square and over a mesh three-fourths inch square.

Pea, which goes through a mesh three-fourths inch square and over a mesh one-fourth inch square.

Buckwheat No. 1, which goes through a mesh one-half inch square and over a mesh one-fourth inch square.

Buckwheat No. 2, or rice, which goes through a mesh one-fourth inch square and over a mesh one-eighth inch square.

Smaller sizes are known as buckwheat No. 3 and culm.

The sizes above pea are known as prepared sizes and are used principally for domestic purposes. The smaller sizes are used almost entirely for steam purposes.

Formerly the smaller sizes had no commercial value and were allowed to accumulate as waste product in banks at the mines. By changes made in the grates of furnaces have facilitated their use for steam purposes, and such use has been increasing rapidly during recent years. By means of "washeries" large quantities of the smaller sizes have been recovered from these waste or culm banks and sent to market to satisfy this increased demand. However, on comparatively small prices can be obtained for these smaller sizes.

The cars are loaded directly from the breakers by means of chutes. The loaded cars are then hauled to a convenient place of concentration along the main track, designated a gathering or assembling point, where they are drilled into trains according to destination and with some reference to the sizes. The coal destined to tidewater points is hauled in trains to yards adjacent to the docks, where a more particular separation takes place; that is, say, coal of particular qualities and sizes is placed on separate tracks and afterwards transferred to the boats or storage bins in accordance with the requirements of different purchasers.

For the year ended June 30, 1908, the Lehigh Valley Railroad Company carried altogether 11,206,774 gross tons of anthracite coal upon which its gross revenue was \$14,908,923.08, showing an average revenue of \$1.24.11 per gross ton, or \$0.00737 per net ton per mile. During the same period the Lehigh Valley's entire freight revenue amounted to 23,643,001 gross tons, its gross revenue \$30,186,581.72, its average rate per gross ton to \$1.277, and its average rate per net ton per mile on all traffic, including anthracite coal, to \$0.00630. It will thus be seen that during 1908 anthracite coal constituted approximately 47 per cent. of defendant's freight tonnage and produced approximately 49 per cent. of its freight revenue. Complainants shipped, between August 1, 1901, and June 30, 1907, 499,901.47 gross tons of anthracite coal, upon which they paid total freight charges of \$709,637.67, resulting in an average rate per net ton per mile (based on the average mileage from the Wyoming region to Perth Amboy of 170 miles) of \$0.00745.

It appears that prior to 1900 various anthracite coal carrying railroads in Pennsylvania, in their endeavor to control the output and sale of anthracite coal, had formed other and distinct corporate organizations, usually known as "coal companies," but which through stock ownership were owned, officered and controlled

the railroads which brought them into existence. Such was the relation that existed between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company. The function of the Lehigh

Valley Coal Company was to acquire, hold and operate vast
29 tracts of anthracite coal lands, and to make contracts with independent operators for their entire output. In connection with the purchase of coal from independent operators there came into existence what are known as "percentage contracts." The Lehigh Valley Coal Company regularly for a period of years entered into such contracts with independent coal operators along the line of the Lehigh Valley Railroad. Under these percentage contracts the Lehigh Valley Coal Company agreed to pay the independent operators fluctuating prices for their coal at the mines, to be arrived at on the basis of certain percentages of the average market prices of the various grades of anthracite coal at tidewater. An accurate check was kept on the tidewater market prices, and monthly settlements were made. Under the contract which was in effect during the greater part of the year 1900, the agreement by the Lehigh Valley Coal Company was to pay the coal operator 60 per cent. of the tidewater price on the highest grade of anthracite coal and lesser percentages on the lower grades. This contract was therefore called the "60-per-cent. contract," due to the fact that that percentage figure applied on the highest grade of coal.

Although the Lehigh Valley Railroad Co. was not nominally a party to any of the percentage contracts entered into by the Lehigh Valley Coal Company, yet it made a practice of settling for the freight charges on coal purchased and shipped by the Lehigh Valley Coal Company at the differences between the amounts paid to the coal operators and the average market prices at tidewater. The result therefore was, taking the highest grade of coal as an illustration, that if the Lehigh Valley Coal Company paid the independent operator 60 per cent. of the tidewater price, the Lehigh Valley Railroad Company transported the coal for 40 per cent. of said tidewater price. It will thus be seen that, although the matter of
freight rates was not mentioned in the contracts made by
30 the Lehigh Valley Coal Company with the independent operators, yet the freight rates were directly dependent upon said contracts.

It appears that if an independent coal operator lacked established business connections or capital, it was to his interest to enter into the percentage contract with the Lehigh Valley Coal Company. Meeker & Company, however, had been in business as sales agents for coal since 1889, and their facilities for selling were adequate. They therefore made a contract with the Stevens Coal Company for practically their entire output of coal. There were also a number of other shippers of anthracite coal over the lines of the Lehigh Valley Railroad, and in order to place them on an equality with the Lehigh Valley Coal Company, they were accorded the same rates as were accorded to that company.

It was the custom for all shippers, including the Lehigh Valley Coal Company, to pay the tariff rates on the various grades of an-

thracite to tidewater, and then by means of monthly settlements be given the benefit of the rates upon the percentage basis, which rates were known as "adjusted rates," and were usually considerably lower than the tariff rates; but which at certain periods, owing to advancing prices of anthracite coal, were higher than the tariff rates. The general purpose of the adjusted rates was, however, to give the shippers the benefit of rates lower than the tariff rates, and, upon the whole, they accomplished this result, and the evidence shows that they were impartially applied on all shipments during the greater part of the time that they were in effect.

In November, 1900, the parties interested (i. e., the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company and the coal producers) began to consider making a change in the terms of the then existing 60-per-cent. contract. It seems that the subject
31 was not of easy solution, and that the negotiations dragged along for nine months, until August 1, 1901, at which time an agreement was reached whereby the price of the highest grade of coal at the breakers was to be 65 per cent. of the tidewater market prices, instead of 60 per cent. as formerly, with related increases on the lower grades. From almost the beginning of these negotiations, it seems to have been the understanding of all parties that whatever arrangement was finally reached would be made retroactive until November 1, 1900, the date of the beginning of the negotiations, and that the Lehigh Valley Railroad Company would readjust its freight charges retroactively in conformity with the new scale of prices not only upon shipments made by the Lehigh Valley Coal Company, but upon all coal shipped by independent dealers.

On the first hearing of this case counsel for the Lehigh Valley Railroad Company took the position that the tariff rates had been paid by all coal shippers during the nine months of negotiations; and that when, on August 1, 1901, it was determined that the 65-per-cent. basis should govern retroactively to November 1, 1900, the extra cost of the coal on this basis was paid by the Lehigh Valley Coal Company to the coal operators. Hence it was argued that the Lehigh Valley Railroad Company, having charged its full tariff rates to all, and the coal company having paid the increased price, there had been no discrimination against Meeker & Company during said nine months. As the evidence in support of this argument was meager and unsatisfactory, a supplemental hearing was had at which additional evidence was asked upon this point. The facts as disclosed by that hearing were as follows:

The Lehigh Valley Railroad Company during the period from November 1, 1900, to August 1, 1901, endeavored to settle with all shippers upon the basis of adjusted rates, under the 60 per cent. contract. During the months of November, December, January,

February and March the adjusted rates upon some of the
32 grades were higher than the tariff rates, owing to the high market price of coal at tidewater. Meeker & Company were expecting the 65-per-cent. contract to be adopted, and believed that the effect of its adoption would be that they would get the benefit of

adjusted rates which were lower than the tariff rates, whereas under the 60-per-cent. contract, they were being called on to pay adjusted rates which were in many instances higher than the tariff rates. They protested against paying money to the Lehigh Valley Railroad Company under the 60-per-cent. basis, which they expected to be subsequently refunded when the 65-per-cent. contract was adopted. They therefore objected to settling upon the basis of the 60-per-cent. "adjusted rates," even as early as November and December, 1900, but under some arrangement or understanding with the coal freight agent of the Lehigh Valley Railroad Company, settlements were made for November and December, in order that the books of that company might be closed for the year. Thereafter they refused to settle upon the basis of the 60-per-cent. adjusted rates, even in those instances where settlement would have involved a refund to them from the tariff rate which they had paid. Their idea seems to have been to have nothing whatever to do with settlements upon the 60-per-cent. basis, because they believed the whole matter would have to be subsequently undone and refigured upon the 65-per-cent. basis.

During the earlier months of 1901, owing to the market prices of coal, the adjusted rates upon the 60-per-cent. basis were in the main higher than the tariff rates; but in April, May and June, and possibly thereafter, owing to the lower prices of coal, the adjusted rates became less than the tariff rates. The evidence does not clearly show whether independent shippers, other than Meeker & Company, paid the adjusted rates, when they were higher than the tariff rates, but the presumption is that some of them at least
33 did so. It appears, however, that shippers other than Meeker & Company accepted refunds from the Lehigh Valley Railroad Company, in such instances as the adjusted rates were lower than the tariff rates.

When it was finally determined, on August 1, 1901, to adopt the 65-per cent. contract, the Lehigh Valley Railroad Company made a systematic effort to pay back to all shippers, including the Lehigh Valley Coal Company, such amounts as may have been paid during the period November 1, 1900, to August 1, 1901, in excess of the tariff rates. There was not, however, at that time any attempt made to collect back from shippers refunds which may have been made to them from month to month when the "adjusted rates" were lower than the tariff rates. It thus appears that the attempted readjustment to basis of tariff rates which the Lehigh Valley Railroad Company sought to make upon the adoption of the 65-per-cent. contract was only partial. Meeker & Company were offered refunds of the excess over tariff rates which had been paid in November and December, 1900, but refused to accept the same, stating in a letter of refusal that they would insist upon settlement of freight rates upon the basis of the newly adopted 65-per-cent. contract.

This brings us to the contention of complainants that the payment of the increased retroactive prices to the coal producers by the Lehigh Valley Coal Company was in fact a payment by the Lehigh Valley Railroad Company, and therefore equivalent to a

readjustment by the latter company of its freight rates upon the basis of the 65-per-cent. contract on such coal as was shipped by the Lehigh Valley Coal Company during the period from November 1, 1900, to August 1, 1901.

Investigation of the books of the Lehigh Valley Railroad Company disclosed the fact that subsequent to August 1, 1901, there were extraordinary cash advances made by that company
 34 to the Lehigh Valley Coal Company, and one of the purposes of the supplemental hearing was to ascertain whether said cash advances included the sum which the Lehigh Valley Coal Company paid to the coal operators under the 65-per-cent. contract which was made retroactive for the nine months from November 1, 1900, to August 1, 1901.

On that hearing it developed that at the end of the year November 30, 1898, the Lehigh Valley Coal Company owed the Lehigh Valley Railroad Company \$1,596,650; that at the end of the year November 30, 1899, the amount of its indebtedness remained unchanged; that during the fiscal year November 30, 1899, to November 30, 1900, there was a strike, production was curtailed and sales were made from stored coal, whereby the coal company was enabled to reduce its stock of coal, and its accounts receivable due from customers for coal sold; that as the result of this condition the indebtedness of the coal company to the railroad company, on November 30, 1900, had been reduced to about \$500,000. The unusual advances made by the railroad company to the coal company in 1901 were necessitated by the resumption of mining operations after the cessation of the strike. Counsel for the Lehigh Valley Railroad Company introduced in evidence the following extracts from the annual report of the company to its stockholders for 1901, viz:

Under the existing arrangements, the Lehigh Valley Coal Company is compelled to depend upon the railroad company for working capital to carry on its operations.

* * * * *

The suspension of mining during the period of the strike last year and the sale of the greater portion of coal in stock enabled the coal company to repay to the railroad company a large proportion of the amount advanced by the latter company for this purpose.

35 And counsel for complainant was permitted to read into the record the following additional extract from the same report, viz:

The uninterrupted continuance of operations during the fiscal year just closed (i. e., the year ending November 30, 1901) restored normal conditions, necessitating advances by the railroad company of a million dollars, which amount is more than represented by the increased tonnage and value of the coal in stock as compared with November 1st last.

The general auditor of the Lehigh Valley Railroad Company testified that the amount which the Lehigh Valley Coal Company had to pay the coal operators under the 65-per-cent. contract, which on August 1, 1901, became effective retroactively to November 1, 1900, was \$231,090.19. He further testified that the deficit of \$491,576.65

shown in the operations of the Lehigh Valley Coal Company for the year ended November 30, 1901, would have been less by \$231,090.19 had it not been for the payment by the coal company to the operators of the increased prices under the retroactive 65-per-cent. contract.

In view of the admissions upon the supplemental hearing the conclusion seems inevitable that the financial condition of the Lehigh Valley Coal Company was not such as to have enabled it to pay the \$231,090.19 to the coal operators out of its own treasury, and that not only this amount, but much larger sums, were advanced by the railroad company to the coal company during the year 1901 for the purpose of enabling the latter to carry on its operations.

It is alleged in the petition that between November 1, 1900, and August 1, 1901, complainants, Meeker & Company, shipped 88,336 tons of coal from the Wyoming region to tidewater at Perth Amboy, N. J., a distance of about 165 miles, on which they paid a sum total as freight charges, amounting to \$129,989.18; whereas upon the 35-per cent. basis which complainants contend was the necessary result of the 65-per cent. contract entered into by the Lehigh Valley Coal Company on August 1, 1901, the freight charges should have been only \$118,867.21, the amount of overpayment by complainants being \$11,121.97.

From the facts disclosed it is apparent that the payment of the \$231,090.19, which was ostensibly made by the Lehigh Valley Coal Company to the coal operators from which it had purchased coal during the period from November 1, 1900, to August 1, 1901, was in fact made from funds advanced as cash by the Lehigh Valley Railroad Company to the Lehigh Valley Coal Company, and was therefore the equivalent of a readjustment of the freight rates upon the basis of the 65-per-cent. contract on such coal as was purchased by the Lehigh Valley Coal Company and shipped to tidewater during the period from November 1, 1900, to August 1, 1901. We are of the opinion and so hold that complainants have sustained the allegation of unjust discrimination under the second section of the act. Reparation, with interest from August 1, 1901, will be awarded on this account.

Since August 1, 1901, complainants and other shippers have paid full tariff rates on coal from the Wyoming region to Perth Amboy, which rates are as follows:

	Per gross ton
Prepared sizes	\$1.55
Pea coal	1.40
Buckwheat coal.....	1.20
Aug. 7, 1904, to Jan. 10, 1905.....	1.25
All sizes below buckwheat.....	1.10

It is alleged in the complaint that any charge in excess of \$1 on all grades subsequent to August 1, 1901, is unreasonable, and reparation is asked by complainants, upon the basis of the suggested rate of \$1, upon all shipments made by them over the Lehigh Valley Rail-

- 37 road during the period August 1, 1901, to July 1, 1907, the aggregate amount of reparation sought during said period being \$210,351.

In a later complaint, filed April 13, 1910, No. 3235, styled Henry E. Meeker vs. Lehigh Valley Railroad Company, complainant seeks reparation on the basis of a rate of \$1 on all grades of coal shipped during the period July 1, 1907, to April 1, 1910, alleging a total overcharge during said period of \$55,290.73.

As the subject-matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case.

When complainants filed their complaint in July, 1907, they elected as to the period from November 1, 1900, to August 1, 1901, to rely entirely upon a violation of the second section of the act, and therefore claimed reparation only to the extent of \$11,121.97, on the ground of discrimination during said period in favor of the Lehigh Valley Coal Company, claiming that the effect of the retroactive 65-per-cent. contract of August 1, 1901, was to readjust upon a lower basis the freight rates which had been paid by the Lehigh Valley Coal Company during said period.

When the case came on for hearing in March, 1909, complainants' counsel announced orally before the Commission, and not by way of amendment of their petition, that they desired to claim additional reparation in the sum of \$41,644.82—the excess paid over \$1 per ton, during the period from November 1, 1900, to August 1, 1901.

Complainants' counsel stated in his brief filed with the Commission, but not by way of amendment to his petition, that by reason of the fact that the Commission may not be convinced that \$1 per ton is a reasonable rate on all grades of coal to tidewater, he desired to put his claim for reparation in an alternative form, viz: That
38 in event the Commission should not approve the suggested rate of \$1 per ton on all grades of coal, complainants are entitled to reparation in the amount of \$156,144.92, the amount by which the freight charges which they have paid exceed what said charges would have been upon the basis of the average rate per ton per mile on all freight transported by the Lehigh Valley Railroad Company. In support of this claim for reparation, he sets forth an exhibit in his brief, which covers the calendar years 1902 to 1907, inclusive. This claim, therefore, does not extend back to November 1, 1900, as do his other claims; but it includes the latter half of 1907, and therefore extends six months beyond the period covered by his larger claim for reparation on the basis of the proposed \$1 rate.

Complainants insist that the average rate per ton per mile upon coal ought not to exceed the average rate per ton per mile upon all freight traffic, and base their claim for reparation in large part upon the assumption that the higher rate per ton-mile on coal is proof of the unreasonableness of the rates in question. Defendant answers this contention by asserting that the initial service in connection with the transportation of coal, commonly called collection or

assembly, and the terminal service at Perth Amboy, are both difficult and complicated, and involve extraordinary operating expenses, as well as the permanent investment of a large amount of capital, which are not incurred in the transportation of other classes of freight. The transportation of coal from the mining regions to Perth Amboy is described in detail in the record and may be summarized as follows:

Coal from the Wyoming region around Wilkes-Barre, after being assembled from the various branches, is carried east by way of Coxton or Pittston Junction over what is known as the Mountain Cut-Off, thence by way of Avoca, Penn Haven Junction and Phillipsburg to South Plainfield, where it leaves the main line for Perth Amboy. Coal from the Lehigh region is collected from the various branches in the neighborhood of Hazleton, Lumber Yard, New Boston and Mount Carmel, and carried to Penn Haven Junction, from which point it follows the same course as the Wyoming coal. Coal from the Schuylkill region reaches the main line at Lizard Creek Junction from the regions around Blackwood. Coal in transit from the Wyoming region to Perth Amboy passes over defendant's Wyoming and New Jersey & Lehigh divisions. The Wyoming division extends from Sayre to Mauch Chunk, and includes the territory known as the Wyoming coal region, or the southern part of the northern coal field, and touches also the Lackawanna coal region. The New Jersey & Lehigh division extends from Easton to the sea end of the Perth Amboy docks. Defendant's Mahanoy & Hazleton division covers a portion of the Lehigh and a portion of the Schuylkill regions in the middle and southern coal fields. This division meets the main line at Penn Haven Junction.

Coal is brought from the colliers to assembly yards, from which it is in turn taken to classification yards, where trains are made up for the main-line hauls. In the Wyoming division there are two such yards, Port Bowkley and Coxton, the former being an assembly yard and the latter both a classification and assembly yard.

At Perth Amboy defendant has adequate terminal facilities, storage bins, two docks and appropriate equipment for the handling of anthracite coal. Ten locomotives and crews are employed by the company in handling coal at the terminal. At the entrance to the terminal are a series of tracks, eight in number, about one-half mile long, known as the receiving tracks, upon which trainloads of coal are left by the road crews. Upon these tracks employees inspect and check the cars and designate by marks thereon the various kinds and sizes of coal, region and colliery from which shipped, and such other information as may be necessary for proper unloading into vessels or storage bins. After the cars are so marked they are classified for purposes of disposition. When orders are received the coal is removed to the docks or stocking bins, both of which are provided with suitable trackage facilities.

Complainants' contention that the rates to Perth Amboy are unreasonable is based in part upon the testimony of certain persons who were formerly officers of the Delaware, Susquehanna & Schuyl-

kill Railroad and of Coxe Brothers & Company. For many years prior to 1905, Coxe Brothers & Company were engaged in mining and shipping anthracite coal from their extensive properties in the Lehigh region. They owned and operated the Delaware, Susquehanna & Schuylkill Railroad, a road about 28 miles in length, which reached their different collieries and connected with the Lehigh Valley Railroad at a place called Lumberyard or Stockton Junction.

After January, 1894, the Coxe coal, instead of being carried to Perth Amboy in the trains of the Lehigh Valley, was transported to tidewater in the trains of the Delaware, Susquehanna & Schuylkill Railroad, and by its motive power, under a trackage contract between that road and the Lehigh Valley, which provided for the use of the tracks of the latter company from Stockton Junction to Perth Amboy, a distance of approximately 125 miles. The agreed compensation to the Lehigh Valley for the use of its tracks was $2\frac{7}{8}$ mills per gross ton per mile, or 35.94 cents per gross ton for the haul from Stockton Junction to Perth Amboy. The Lehigh Valley unloaded the coal at Perth Amboy into vessels or bins and performed other terminal service, for which it charged Coxe Brothers 12 cents per ton. Additional payments were agreed upon from time to time for other services by the Lehigh Valley, such as supplying additional motive power to push trains over grades, furnishing coal to Delaware, Susquehanna & Schuylkill locomotives, repairing cars at Perth Amboy and similar incidentals.

41 The contract of January, 1894, remained in force until April, 1904, when it was replaced by another contract, substantially similar in all material respects and providing for the same compensation to the Lehigh Valley and which was to have remained in effect for a period of 15 years. It remained in effect, however, only until 1905, when the Coxe properties were purchased by the Lehigh Valley Railroad.

During the period prior to the absorption of the Delaware, Susquehanna & Schuylkill Railroad by the Lehigh Valley Railroad Company, L. C. Smith, manager of the Delaware, Susquehanna & Schuylkill Railroad Company, and J. H. Pennington, superintendent of motive power of said railroad, and J. Brinton White, vice president and treasurer of Coxe Brothers & Company, made certain calculations as to the cost of the Delaware, Susquehanna & Schuylkill Railroad of transporting anthracite coal to Perth Amboy, based on various elements of operating expense, including the aforementioned trackage charge of the Lehigh Valley Railroad.

Counsel for complainants has introduced the testimony of these three men relative to the cost of transporting coal from the Lehigh region; and insists that it has an important bearing on the cost of transporting coal from the Wyoming region, for the reason that it has been the custom of the Lehigh Valley Railroad Company to make the same rates from the Wyoming region to Perth Amboy as from the Lehigh region to Perth Amboy; and also because the Wyoming region has the advantage over the Lehigh region, both in distance and in grades.

L. C. Smith, former manager of the Delaware, Susquehanna &

Schuylkill Railroad, testified that about 1900, he, as manager of the Delaware, Susquehanna & Schuylkill Railroad, made up a statement of cost to move one train of coal from Drifton, a mine of

42 Coxe Brothers & Company, to Perth Amboy, including trackage to the Lehigh Valley Railroad Company, the shipping charges of that company at Perth Amboy, and the return of empty cars, which statement is filed as Complainants' Exhibit No. 1.

The total cost per ton shown by said exhibit is 76.54 cents.

J. Brinton White, vice president and treasurer of Coxe Brothers & Company, who owned the entire stock of the Delaware, Susquehanna & Schuylkill Railroad Company, made frequent calculations as to the cost per ton of the movement of coal from the mines on the Delaware, Susquehanna & Schuylkill Railroad to Perth Amboy, and continued these calculations until he "got down to a figure which he knew to be correct." The figure which Mr. White arrived at was 76 cents per ton; but as this 76 cents included the trackage charge of the Lehigh Valley Railroad and the shipping charges at Perth Amboy, he was of opinion that the profit of the Lehigh Valley should have been deducted from the 76 cents, if the profit could have been ascertained.

J. H. Pennington was superintendent of motive power of the Delaware, Susquehanna & Schuylkill Railroad Company from 1899 until the latter part of 1905, when that road was bought by the Lehigh Valley Railroad Company, and he made certain tests for the purpose of determining the relative cost of transporting coal from Delaware, Susquehanna & Schuylkill Railroad mines to Perth Amboy in 60,000 and 100,000 pound capacity cars, respectively.

Based upon his tests for the cars of 100,000 pounds capacity (which it is claimed are now in use), counsel for complainants claims to show that the cost of transporting a ton of coal from the mines of the Delaware, Susquehanna & Schuylkill Railroad to and including the dumping of the cars at Perth Amboy, and the return of the empty cars to the colliery, amounted to 62.41 cents; which

43 figure includes the profit of the Lehigh Valley Railroad Company on its trackage charge and the profit on the shipping expenses of 12 cents at Perth Amboy.

Counsel for the Lehigh Valley Railroad Company, in his brief, enters upon an exhaustive criticism of Complainants' Exhibit No. 1. Among other things he says:

The exhibit includes no allowance for assembling; it contains no allowance for reserve equipment; it contains no allowance for depreciation; no allowance is made for overtime of crew; no allowance is made for non-revenue haul; no allowance is made for loss and damage or injuries to persons; the item shown for fuel is manifestly inadequate; the wages allowed are inadequate.

He also argues that as the estimate of J. Brinton White confirms that of Mr. Smith, the presumption is that Mr. White omitted the same items that were omitted by Mr. Smith.

As to J. H. Pennington's estimate of the cost per gross ton of transporting coal to Perth Amboy, counsel for the Lehigh Valley Railroad Company says that he admitted that in making the test

he purposely left out of account such expenses as would be substantially the same, whether he used 60,000-pound cars or 100,000-pound cars. He did not take into account the following:

- Reserve engines.
- Maintenance and repairs of locomotives.
- Repairs to cars.
- Expenses of telephone and telegraph.
- Stationery.
- Clerks.
- General office expenses.
- Yard expenses.
- Terminal expenses.
- Loss and damage claims.
- Clearing wrecks, etc.

It will be noted that in the calculations made by L. C. Smith and J. Brinton White, one of the most important items was the trackage charge of 35.94 cents per gross ton, which the Lehigh Valley Railroad Company charged the Delaware, Susquehanna & Schuylkill Railroad for the use of its tracks for the 125-mile haul from Stockton Junction to Perth Amboy.

As it did not clearly appear from the record what the conditions were that led to the trackage arrangement, further testimony was taken upon that point at the supplemental hearing. It was shown that prior to the trackage contract entered into by the Delaware, Susquehanna & Schuylkill Railroad Company with the Lehigh Valley Railroad Company, the coal traffic originating on the Delaware, Susquehanna & Schuylkill Railroad had moved to tide water over the lines of the Philadelphia & Reading Railroad. The following extract from the annual report of the Philadelphia & Reading Railroad Company for the year ended November 30, 1893, was read into the record:

A contract was made with Coxe Brothers & Company, under date of May 14, 1891, for the transportation over the Reading Railroad System of a large tonnage of coal from the mines of that company to New York tidewater and to other markets, the minimum amount to be 1,000,000 tons per annum.

In order to transport the coal to be furnished under this contract, a railroad 10 miles in length was constructed by the Reading Company to connect its lines with those of the Delaware, Susquehanna & Schuylkill Railroad, which was controlled by Coxe Brothers & Company, and a large coal tonnage had passed and was passing over this road; but the division of the freight rate as between the two railroad companies was felt by the receivers to be so inequitable to the Reading Company, as on the greater part of the tonnage it allowed the Delaware, Susquehanna & Schuylkill Railroad Company an average of about 73 cents per ton for gathering the coal, hauling it an average of about 12 miles to Roan Junction, and shipping it at Port Johnston, leaving for the Reading Company only 80 cents per ton for hauling the coal 168 miles to Bound Brook Junction, that they notified Coxe Brothers & Company that after August 15, 1893, they would no longer trans-

port their coal under that contract, offering, however, to continue to carry the coal upon terms similar to those which are ordinarily accorded to other railroad companies for the exchange of similar business. This offer was, however, not found satisfactory by Coxe Brothers & Company, and the transportation of their coal has, therefore, been almost entirely lost to the Reading Company.

The following extract from the annual report of the Lehigh Valley Railroad Company to its stockholders, for 1894, was also read into the record:

On January 31, 1894, a contract was entered into with the Delaware, Susquehanna & Schuylkill Railroad Company, whereby that company was granted the privilege of running its own trains coal laden to the tidewaters of New York, thus assuring to this company for a term of 15 years from July 1, 1894, an important traffic, that of the Cross Creek Coal Company, formerly Coxe Brothers & Company, for which several outlets existed, and which had been in contention for some time previously. It also removed an incentive for the construction of new lines into the territory tributary to the Lehigh Valley System. Local coal received from the line of that company continues to be hauled in our trains as it was previously.

It appears that, when the contract with the Lehigh Valley Railroad Company was entered into, the Philadelphia & Reading Railroad Company tore up its 10-mile extension which it had built to connect with the Delaware, Susquehanna & Schuylkill, because there was no longer any use for it.

For the purpose of showing the effect of the trackage contract of January, 1894, upon the movement of anthracite coal over the Lehigh Valley Railroad, counsel for that company at the supplemental hearing, put in evidence the following exhibit, viz:

46 *Statement of Anthracite Coal Received from the Delaware, Susquehanna & Schuylkill Railroad During the Fiscal Years Ended November 30.*

Year.	Gross tons.	Year.	Gross tons.
1891.....	213,031	1894.....	976,415
1892.....	199,310	1895.....	1,053,965
1893.....	350,295	1896.....	1,115,077
Total.....	762,636	Total.....	3,145,457

It was also shown that the Central Railroad of New Jersey had a track into Drifton, a point located on the Delaware, Susquehanna & Schuylkill Railroad, and that the Delaware, Susquehanna & Schuylkill Railroad also had a connection with the Pennsylvania at Tomhicken.

Defendant has endeavored to show the actual cost of transporting coal from the Wyoming district to the barges at Perth Amboy. Three civil engineers, William J. Wilgus, J. F. Stevens and John F. Wallace, were engaged by defendant to investigate the transportation of coal from the anthracite region to tidewater for the purpose of ascertaining the cost thereof. They were assisted in their inves-

tigation by officers and employees of the road and by engineers in Mr. Wilgus' office. Mr. Wilgus prepared an estimate of the cost of carrying coal based upon theories and formulae which were approved by the other engineers. His estimate is set forth in a voluminous exhibit known as "Defendant's Exhibit F-3." The exhibit contains all the details from which the final estimate of cost is deduced. The recapitulation of Exhibit F-3 is as follows:

47 *Cost of Transporting Anthracite Coal on the Lehigh Valley Railroad from the Wyoming District to Perth Amboy.*

Items.	Perth Amboy terminal.	Main line, Perth Amboy to Coxtown.	Wyoming collection district.	Total.
Operating expenses, including taxes.....	\$0.1189	\$0.6915	\$0.0866	\$0.897
Interest:				
Roadbed, tracks, and structures.....	.0700	.1470	.0412	.258
Equipment.....	.0096	.0437	.0283	.081
General facilities.....	.0012	.0046	.0010	.006
	.0808	.1952	.0705	.346
Depreciation:				
Roadbed, tracks, and structures.....	.0071	.0034	.0009	.0114
Equipment.....	.0080	.0046	.0176	.0902
General facilities.....	.0004	.0015	.0003	.0022
	.0155	.0095	.0188	.0438
Total.....	.2152	.9562		1.347
Additions and betterments.....				.0406
Risks and deficits.....				.1070
Grand total.....				1.4943

There are many circumstances, however, connected with the preparation of this exhibit, which seriously impair its value as evidence on the question of cost.

Mr. Wilgus testified that the figures which he used in preparing said exhibit as to the value of the roadbed, track and structures, and value of equipment, were based on an examination of the road and an examination of the equipment, and that he had attempted to estimate the cost of reproduction. This work, he states, was done by himself and assistants in his employ. The assistant in his employ who undertook to make an examination of the road with a view to determining the cost of reproduction was T. A. Lang and Mr. Wilgus testified that his calculations are absolutely dependent upon the information furnished him by Lang.

The story of Mr. Lang's investigation as to cost of reproduction, as told by Lang himself, was as follows:

48 He left Perth Amboy at 1.20 P. M. on a passenger train for Easton, arriving there about 3.20 or 3.30 P. M. In going to Easton he stood on the rear platform of the train. After arriving at Easton, he did nothing more that day, as it was Sunday. The following morning at 9 A. M. he left Easton on a pony engine, which had a coach on top of the boiler. On this engine he traveled at the

rate of 15 or 20 miles an hour, stopping at various points. About 5.30 P. M., of the same day, he arrived at Wilkes-Barre and stayed there all night, all the next day and the next night. While there he made computations in the railroad company's office. On the following day he left Wilkes-Barre at 8.30 A. M. on a passenger train and arrived at Easton about 11 or 12 o'clock. He remained in Easton until that afternoon, and then took a train for New York. While at Easton he devoted a "few minutes" to an examination of the Delaware bridge and the Easton steel viaduct. Based upon this examination, he furnished Mr. Wilgus the data which he required as to estimated cost of reproduction of the Lehigh Valley Railroad.

This examination by Lang was made in the latter part of April, 1909. Mr. Wilgus accepted his estimates, and gave his testimony on April 29, 1909. Mr. Lang, however, was not called as a witness until May 25, 1909. Evidently feeling that his first superficial examination of the road would become the subject of attack, he undertook early in May to make a more thorough examination of the road.

On this second trip he consumed eight and one-half days going over the road on a hand car, and the results of his work on the second trip he terms "his check estimate." The cross-examination of Mr. Lang developed that his check estimate was also a very superficial piece of work. He testified that he "could see" the thickness of the ballast "very easily," and that he measured it "at one place"

only; that it was from 18 to 20 inches in thickness. He also
49 testified that he started out to count the number of switches and frogs, but did not carry it all the way through. He further says that there never had been any examination of the ties and ballast or going over the road in a hand car at the time that Mr. Wilgus made his estimate.

Based upon information thus furnished, Mr. Wilgus undertook to determine the cost of carrying a ton of coal from the Wyoming district to Perth Amboy, and Messrs. Wallace and Stevens were called as witnesses to confirm the reliability of his figures.

Mr. Wilgus testified that on the trip which he made over the Lehigh Valley Railroad, he started from New York at 6 P. M. in an observation car with Messrs. Wallace and Stevens and certain officials of the Lehigh Valley Railroad Company, and went to Wilkes-Barre. The two following days were spent in riding over the main line of the Lehigh Valley Railroad and some of its branches. It appears never to have been the intention that Messrs. Wilgus, Wallace or Stevens should personally do any of the detail work incidental to the determination of the cost of carrying coal to Perth Amboy. All of that was to be done for them by subordinates, and they were then to testify whether they believed the works of these subordinates constituted a conservative estimate of the cost.

Mr. Stevens testified in substance that he believed it possible for a competent engineer to get a correct approximate idea of the value of a railroad by riding over it, and that he has done considerable work in estimating values by traveling over railroads. He stated

that he was not prepared to dispute Mr. Wilgus' figures, and that he would not guarantee them; and "that it would be worse than foolish for him to say that he had time to undertake to make a mile-by-mile estimate of the cost of reproducing the Lehigh Valley Railroad." The most that he had to say concerning Mr. Wilgus' estimate was that it was "probably conservative."

50 Mr. Wallace frankly admitted that his testimony given in corroboration of Mr. Wilgus' figures was a matter of pure personal judgment, based on his experience and observation. He testified that men in his line of business were continually drawing comparisons and making "estimated judgments," and that sometimes they were correct and sometimes wrong. He further stated that it was his custom to value railroad property very much as a farmer would value a horse.

The estimate of cost made by Mr. Wilgus is based on the fundamental assumption that the cost of carrying coal is equal to the average cost of carrying all traffic. If this proposition be sound, it follows that by far the greater part of tariffs covering the transportation of coal are improperly constructed, for the rates upon coal are generally much below the average rates.

Again, as a basis of apportioning expenses for which no actual division could be obtained, the engineers used the relation of passenger-train ton-mileage to freight-train ton-mileage, finding that of the total the former was 7.8 per cent. and the latter 92.2 per cent. This arbitrary basis of apportionment seems to be unwarranted when we take into consideration the relation which exists between freight revenue and passenger-train revenue on the Lehigh Valley Railroad. Those revenues were as follows for the years shown:

	1901.	1905.	1908.	1910.
Total freight revenue.....	\$19,829,363	\$25,962,920	\$30,186,582	\$30,579,000
Passenger-train revenue.....	3,460,528	4,116,847	4,842,652	5,097,000

It thus appears that upon the basis of relative earnings at least 14 per cent. of the value of the road could properly have been assigned to passenger traffic, whereas in the estimate made by Mr. Wilgus but 7.8 per cent. has been so assigned.

Moreover, it will be noted that the estimate of cost shows that the average cost of carrying anthracite coal from the Wyoming region to Perth Amboy is \$1.49. An exhibit filed by the Lehigh Valley shows that its average receipts per gross ton of anthracite coal to Perth Amboy for the 10 years ending June 30, 1908, were \$1.46. It would therefore follow that all anthracite coal which has been hauled by the Lehigh Valley to tidewater has been carried at a loss of about 3 cents per ton. But it is shown by reports on file with the Commission that the operations of the Lehigh Valley Railroad Company for a number of years past have been exceedingly profitable, and as anthracite coal has constituted almost half of its tonnage, it is fair to assume that it has made a profit upon the handling of that commodity.

There are other matters contained in the record which go to show that the cost of transporting coal as estimated by Mr. Wilgus is excessive.

Henry B. Ely, who was formerly general eastern agent for Coxe Brothers & Company, testified that after the decision in the case of Coxe Brothers & Co. vs. Lehigh Valley Railroad Company, 4 I. C. C. Rep., 535, in 1891, and up to the 31st of January, 1894, the rates paid by Coxe Brothers & Company were the tariff rates of the Lehigh Valley, less a discount of 35 per cent. The tariff rates which were in effect during this period are contained in an exhibit filed by the Lehigh Valley, and deducting said discount therefrom, it appears that the rates actually charged Coxe Brothers & Company were as follows:

	Rate per ton.
For prepared sizes.....	\$1.10½
For pea coal.....	.91
For buckwheat and smaller sizes.....	.78

Defendant has also filed in evidence an exhibit, which shows the adjusted rates to Perth Amboy on the various grades of anthracite coal, by months, during the period from January, 1895, to October, 1900, inclusive, a period of five years and nine months, immediately preceding the discontinuance of adjustments upon the percentage basis. An average of the rates contained in said exhibit shows the following:

	Rate per ton.
Prepared sizes	\$1.4164
Pea coal	1.1712
Buckwheat	1.1566

These latter figures are of themselves sufficient to show that the estimated cost of carrying coal to tidewater of \$1.49 is far from correct.

A very noticeable feature of the work of these experts employed as disinterested parties to ascertain the cost of carrying coal to Perth Amboy is the manner in which they arrived at their valuations of real estate and rights of way.

Mr. Wilgus testified that he did not himself make the estimates upon the value of the Perth Amboy terminals, but took the estimates of his assistant, Mr. Van Houton. Mr. Van Houton testified that he got his information as to the cost of reproduction of the Perth Amboy terminals from the general solicitor of the defendant, because he is an authority on real estate and handles all the real estate matters for the Lehigh Valley Railroad. Mr. Wilgus also stated that he valued the right of way from Perth Amboy to South Plainfield Junction at \$3,000 an acre, and between Penn Haven and Phillipsburg at \$1,200 an acre, and that these estimates were made "not only upon the way it impressed me, but also from consultation with Mr. Schaperkotter, the general solicitor of the company."

Complainants have called attention to the rates of the Pennsylvania Railroad Company for the transportation of anthracite and the rates of certain bituminous carriers. The Pennsylvania Railroad Company carries anthracite coal from South Wilkes-Barre and

Plymouth, in the Wyoming region, to South Amboy, N. J. There are two routes by which the Pennsylvania may carry this coal, the longer route being 276 miles and the shorter 222 miles. Owing to the fact that the grades on the long haul are very much easier than those on the short haul, the long haul is the one generally used. Its rates for this transportation are as follows: Prepared sizes, \$1.40 per gross ton; pea coal, \$1.25 per gross ton; and buckwheat, \$1.15 per gross ton. Up to a comparatively recent date the same rates applied from points on the Delaware, Lackawanna & Western Railroad, which brought the coal to the Pennsylvania Railroad, and the Pennsylvania allowed the Lackawanna a 15-cent lateral charge. The Pennsylvania has since withdrawn the lateral allowance and requires payment to it of its full rate.

The Norfolk & Western Railway Company transports bituminous coal from Pocahontas to Lambert's Point, 377 miles, crossing the Blue Ridge and Allegheny Mountains, at a rate of \$1.40 per gross ton, and this includes the collection of the coal in the Pocahontas district and dumping the same into vessels at Lambert's Point. The rate per ton per mile for this haul is \$0.00377. In the Pocahontas district there are two assembling yards, Bluefield and Vivian, the average distance of the collieries from Bluefield being about 29 miles, and the average distance of the collieries from Vivian about 15 miles. During 1907 the Norfolk & Western collected from the 67 collieries in the district 7,285,360 tons of coal. During the same year the Lehigh Valley collected 4,142,442 tons from the 26 collieries connected with its tracks in the Wyoming region. The following exhibit shows certain rates for the transportation of bituminous coal, together with the length of haul and the rate per ton per mile:

54 *Statement Showing Origin, Destination, Transporting Railroad, Miles Hauled, Rate Charged, and Rate per Ton per Mile on Bituminous Coal Shipments to Tidewater.*

(2,240 Pounds per Ton. Rates Include Dumpage from Piers to Vessels.)

Region or district.	Transporting railroad.	Destination.	Miles hauled.	Rate charged.	Rate in cents per ton per mile.
Myerdale	Baltimore & Ohio	Baltimore	215.0	\$1.18	0.546
Do.	do.	Philadelphia	310.8	1.25	.402
Do.	do.	St. George	390.6	1.55	.394
Pocahontas	Norfolk & Western	Norfolk (Lambert's Point) ..	377.0	1.40	.371
New River Thurmond.	Chesapeake & Ohio	Newport News via Lynchburg ..	418.0	1.40	.332
Do.	do.	Newport News via Gordonville ..	381.0	1.40	.367
Kanawha Handley.	do.	Newport News via Lynchburg ..	457.0	1.50	.328
Do.	do.	Newport News via Gordonville ..	420.0	1.50	.357
Kentucky Marrowbone.	do.	Newport News via Lynchburg ..	673.0	1.70	.252
Do.	do.	Newport News via Gordonville ..	636.0	1.70	.267
Beech Creek	New York Central and Philadelphia & Reading.	Port Reading	308.0	1.55	.500
Do.	do.	Philadelphia (Port Richmond) ..	229.0	1.25	.540
Clearfield	Pennsylvania R. R.	Baltimore (Canton Pier)	242.2	1.18	.487
Do.	do.	South Amboy	322.5	1.55	.480
Do.	do.	Philadelphia (Greenwich pier) ..	252.2	1.25	.497
Do.	do.	Philadelphia via Lock Haven and Susbury ..	317.0	1.25	.391

Defendant answers that the tidewater rate of the Pennsylvania Railroad, cited by the complainants, is entirely inconsistent with the other anthracite rates charged by the Pennsylvania, whereas the Lehigh Valley tidewater rate is in line and consistent with its other anthracite rates. An exhibit in this connection shows that the Pennsylvania Railroad Company's rate on prepared sizes to Harrisburg, a distance of 110 miles, is \$1.50; to Philadelphia, a distance of 164 miles, \$1.80; to Reading, a distance of 111 miles, \$1.80; to Perth Amboy, a distance of 226 miles, \$1.80; to South Amboy, when not for transshipment, \$1.80. The Pennsylvania Railroad Company is a bituminous rather than an anthracite road.

55 The defendant also introduced evidence tending to show that the market for anthracite coal on the lines of the Pennsylvania Railroad exhausts the supply originating on the road, and for this reason a 15-cent lateral was allowed on coal assembled on other roads and turned over to the Pennsylvania. On such shipments the Pennsylvania was relieved of the gathering cost; and in view of the high line rates on anthracite coal over the Pennsylvania, the arrangement was favorable to the railroad. As has been noted, the Pennsylvania has since withdrawn the lateral allowance.

In so far as the comparison with bituminous rates is concerned the defendant calls attention to the fact that bituminous rates are generally less than anthracite rates, due in part to the difference in value of the two kinds of coal, and that there are dissimilarities in connection with the carriage and shipment of bituminous and anthracite coal which render the transportation of anthracite coal more expensive. About 95 per cent. of the coal shipped from the bituminous regions is run of mine and no such elaborate classification is necessary in the assembling regions as in the anthracite region. Bituminous coal is not stored at tidewater and the carriers are therefore relieved of the expense of building storage bins and of placing the coal in the bins and removing it therefrom. It is also claimed that the carriage of bituminous coal involves less empty car mileage, but upon that point the record is rather indefinite. At any rate, the conditions relating to the transportation of anthracite and bituminous coal have not been shown to be similar to such a degree that the existence of a lower rate on bituminous would warrant a conclusion that a higher rate on anthracite on a different road is unreasonable.

It is earnestly contended that any such comparison disregards the fact that the Lehigh Valley Railroad was built and is maintained primarily as a coal-carrying road; that as such it has the right to receive a return upon the coal transported sufficient to enable it to operate profitably, and is further justified in obtaining all traffic that it can secure in addition to its anthracite tonnage at rates which exceed cost of operation; and that a successful search for such outside tonnage, so long as it is carried at a margin of profit above operating expenses, aids the road to perform more cheaply its service in gathering and carrying coal.

56 Defendant contends that the extraordinary terminal expense attributable to the comparatively short haul on anthracite coal makes any per-ton-per-mile comparison improper and misleading.

In connection with its terminal at Perth Amboy, defendant has erected 372 stocking or storage bins, which vary in capacity from 500 to 1,000 tons each, and have a total capacity of about 250,000 tons. Trestles extend over the stocking bins and coal is dropped into them from cars which have been pushed onto the trestles. Underneath the stocking bins are tunnels through which cars are run to remove the coal as called for. About 350 cars of 60,000 pounds capacity are employed exclusively in removing coal from the bins.

Attention is called by defendant to the special privileges accorded and services rendered in connection with the transportation of anthracite coal without extra compensation above the tidewater rates. The rate covers delivery of coal by the railroad into vessels at Perth Amboy. No demurrage is charged on cars at the collieries or at Perth Amboy. A slight deduction is made from the scale weights at the collieries to offset the weight of water in the coal when loaded, and an allowance is made for depreciation in weight due to re-handling. The shippers have the privilege of stocking in transit. Extensive storage privileges are permitted at Perth Amboy, the railroad providing the bins and performing the labor of storing and lifting from storage without additional compensation. This privilege tends to permit daily operation of mines to the limit of their

57 production regardless of the fluctuation of the market demand. Moreover, the demand for different sizes is more or less irregular, while the production of the several sizes is fairly uniform; and this condition makes the storage privilege of additional value to the shipper at certain seasons of the year. Complainants have freely exercised their privilege of storage. In 1907 they had 47.56 per cent. and in 1908 32.27 per cent. of the coal shipped by them to Perth Amboy placed in the bins. Of the coal tonnage carried to Perth Amboy in 1908, 20.96 per cent. was placed in the bins.

It is claimed that the limited life of anthracite railroads has an important bearing on the matter of freight rates, and is therefore a factor to be taken into consideration in connection with the question of "fair return".

As to the limited life of the anthracite railroads, counsel for defendant say in their brief:

The evidence establishes the fact that when the railroad shall be deprived of the tonnage from the collieries along its lines, and the incidental tonnage involved in and dependent upon the production of coal, the traffic on the Mahanoy and Hazleton Division and the Blackwood Branch will for all intents and purposes be nil.

As to the Wyoming Division, the investment in everything but the main line will have been destroyed, and the continued existence of the road will depend upon whether or not the through traffic is sufficient to pay the operating expenses and the interest charges.

There are many instances where, on account of closing up breakers for one reason or another, portions of the Lehigh Valley Railroad have already become useless.

They then cite the following instances of abandoned tracks in the Wyoming region, viz:

58

Crescent breaker, 1 mile long, abandoned 1900.

Babylon breaker, $1\frac{1}{2}$ miles.

Lawrence track, partially abandoned, length not given.

Phoenix track, 1 mile long.

Heidelberg breaker, No. 2, tracks abandoned, length not given.

Henry breaker, tracks $1\frac{1}{3}$ miles long, will soon be abandoned.

Wyoming breaker, $\frac{1}{4}$ mile long.

Midvale track, $\frac{1}{2}$ mile long, abandoned.

Franklin breaker, $1\frac{1}{5}$ miles.

Abbott or Hillman mine, $\frac{1}{3}$ mile long.

Mosier mine, track $1\frac{9}{100}$ miles, abandoned.

Butler colliery, tracks taken up; length not given.

In addition, it is stated that many collieries have been abandoned which have not involved the taking up of tracks, the tracks remaining in partial use in connection with other breakers.

It will be noted that while the list of abandoned tracks in the Wyoming district has the appearance of being quite large, yet the sum total of such of the mileages as are specified shows that a fraction more than 8 miles have been abandoned.

Counsel also in their brief give quite a list of names of breakers which have been abandoned on the Mahanoy and Hazleton Division; but it is found that the total of abandoned mileage on this division is only 9.5 miles.

As to the kindred subject, namely, the exhaustion of anthracite coal supply, counsel in their brief thus state the result of the testimony of W. F. Dodge, an expert mining engineer, introduced as a witness on behalf of the defendant:

The total future shipments from the Wyoming Division, starting with the year 1909, will amount to 91,230,000 tons. The lives of the various collieries will vary from 5 to 50 years. The annual output is estimated for the first five years to be 19,395,000 tons, and will diminish gradually until, from the twenty-fifth to the thirtieth year, the annual output is estimated at only 7,055,000 tons, dwindling down in the period between the forty-fifth and fiftieth years to 50,000 tons per annum. At the end of 25 years, according to the testimony of Mr. Dodge, the output of the Wyoming region will be less than half what it is now, and at the end of 50 years will cease altogether.

On the other hand the following more optimistic view of the situation appears from the Report of the Anthracite Coal Strike Commission, rendered to the President of the United States, March 18, 1903, viz:

What is of some importance, however, in connection with the discussion of the past production is a consideration of what is to be expected in the future in the way of production and the probable duration of the anthracite coal supply. The original deposits of the anthracite coal field have been ascertained with a reasonable degree of accuracy.

According to the estimates of the Pennsylvania geological survey, the amount of workable anthracite coal originally in the ground was 19,500,000,000 tons. The production to the close of 1901, as

previously stated, amounted to 1,350,000,000 long tons, which would indicate that there remained still available a total of 18,150,000,000 tons. Unfortunately, however, for every ton of coal mined and marketed one and one-half tons, approximately, are either wasted or left in the ground as pillars for the protection of the workings, so that the actual yield of the beds is only about 40 per cent. of the contents. Upon this basis the exhaustion to date has amounted to 3,375,000,000 tons. Deducting from this the original deposits, the amount of anthracite remaining in the ground at the close of 1901 is found to be, approximately, 16,125,000,000. Upon the basis of 40 per cent. recovery, this would yield 6,450,000,000 long tons. The total production in 1901 was 60,242,560 long tons. If this rate of production were to continue steadily, the fields would become exhausted in just about one hundred years.

Mr. William Griffith, in a series of articles contributed to the Bond Record in 1896, considers that the estimates upon which the foregoing computations have been made were too liberal. His estimate of the amount of minable coal remaining at the close of 1895 was 5,073,786,750 tons.

In the six years from 1896 to 1901, inclusive, the production has been, approximately, 308,570,000 tons, which would leave still available for mining 4,765,216,750 tons. This supply, at the rate of production in 1901, would last a little less than 80 years. But as indicating how susceptible to error are human predictions, it is well to state that in his carefully prepared statement, published in 1896, Mr. Griffith assumes the limit of annual production would be reached in 1906 and would amount in that year to 60,000,000 tons.

This amount of production was reached in 1901, in just half the time predicted by Mr. Griffith, and the production of January, 1903, as recently reported, shows that the anthracite mines are capable of producing at a rate of 72,000,000 tons annually in their present state of development. It is not to be supposed, however, that the annual rate of anthracite production will continue practically uniform until the mines are exhausted and then suddenly cease. Portions of the fields have already been worked out, others are rapidly approaching total exhaustion, while others at the present rate of production will, it is calculated, last from 700 to 800 years. If we can assume the annual production will have reached its maximum limit at 61 between 60,000,000 and 75,000,000 tons, and that the production will then fall off gradually as it increased, we may expect anthracite mining to continue for a period of from 200 to 250 years. (Report of Anthracite Coal Strike Commission, pp. 21, 22.)

Defendant claims the right to earn enough out of its coal rates to provide for a return of the principal of the investment in that part of the railroad company devoted to the carriage of coal, when and as this principal becomes reduced and extinguished by exhaustion of the coal. We have noted the estimate of defendant's witnesses to the effect that shipments of anthracite coal over the railroad will practically cease in 50 years, and we have quoted the opinion ex-

pressed on the same subject by the Anthracite Coal Strike Commission to the effect that production may last for 250 years. Probably the truth lies somewhere between the two extremes. During the years 1903 to 1910, the Lehigh Valley Railroad Company under the rates in controversy succeeded in accumulating an unappropriated surplus of \$27,219,780. If the company could accumulate this sum for every eight-year period during the next 30 or 40 years, it would have a surplus in the neighborhood of \$125,000,000. It seems, therefore, that the present rates are more than sufficient to meet defendant's idea of an annual income sufficient to provide for return of the capital when that part of the railroad devoted to the carriage of anthracite coal loses its earning capacity through the exhaustion of that commodity. This matter, however, is too speculative to be of much value in determining the reasonableness of present rates. By the time anthracite coal is exhausted other traffic may have become so dense that the present value of the road will not be impaired.

It requires no extended argument to sustain the proposition that the maintenance of an unreasonably high rate operates to the advantage of the Lehigh Valley Railroad Company as a dealer in coal. The record shows that the only line of demarcation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company is one of bookkeeping. Assuming for purposes of illustration that the cost of mining anthracite coal is \$2 per ton and the cost of carrying it to tidewater is \$1 per ton, it follows that the cost of coal at tidewater would be \$3 per ton; and if the published rate were \$1 the independent operator and the railroad coal company would be on a fair competitive basis so far as the cost of mining and transportation are concerned. But as between the railroad company and its coal company it matters not whether the profit comes from mining or transporting the coal. So, therefore, if, instead of the \$1 rate above mentioned, the railroad company were to establish a rate of \$1.50 per ton, the railroad and its coal company could still sell coal at tidewater for \$3 per ton, standing a deficit of 50 cents per ton in the mining price and taking an equal profit in the transportation price. But the independent operator cannot recoup himself in this manner, and the best price that he could make at tidewater would necessarily be the mining price of \$2, plus the carrying charge of \$1.50, or \$3.50; and he would enter the market at a disadvantage of 50 cents per ton as compared with the railroad and its coal company. It is obvious that such an advantage would enable the railroad company and its alter ego, the coal company, to monopolize the field of production and the selling market. Whatever the means employed, it is a fact that the railroad coal company has monopolized the coal field served by it. In 1901, 47 per cent. of the defendant's coal tonnage to Perth Amboy was controlled by it and 53 per cent. by independent operators; while in 1908 the defendant controlled 95 per cent. of the anthracite tonnage over defendant's line to Perth Amboy and the independent operators 5 per cent. During the same period

complainants' shipments to Perth Amboy decreased from 147,811 tons for 1901 to 40,562 tons for 1908.

63 Coming now to the question of the reasonableness of the rates, counsel for defendants asserts that the rates on coal must be sufficient to produce four results, viz: (1) An income sufficient to make up for past deficiencies in current return on investment. (2) A reasonable current annual return upon the investment in the railroad and transportation adjuncts. (3) An amount sufficient to provide reasonably for keeping the property up to constantly modern standards—i. e., such improvements as are necessary for public convenience and safety and to enable the railroad to get business in competition with other roads. (4) An amount sufficient to provide for a return of the principal of the investment, when and as this principal becomes reduced and extinguished by the exhaustion of coal freight.

Under the first proposition defendant argues that the present rates should be sufficiently high to enable it now to earn the amount by which it has fallen short of paying a 6 per cent. annual dividend in the past, or at least as far back as 1894. It shows that a dividend rate of 6 per cent. applied to its common stock of \$40,441,100 for the period from November 30, 1894, to June 30, 1908, would amount to \$35,091,276; that during this period the dividends paid amounted to \$7,260,264; and argues that upon a 6-per-cent basis the common-stock shareholders suffered a deficiency in dividends during this 14½-year period of \$27,831,112. In the Wilgus estimate above mentioned 10 cents per ton is added to the assumed cost of carrying coal to Perth Amboy for the purpose of "making good the deficit of over \$20,000,000 in dividends" for past years.

Assuming, without conceding, that the present producers and consumers of anthracite coal must bear the burden of the misfortunes or mismanagement of a previous generation, it is worth while to inquire whether this claim does not amount for the most part to a declaration, not that the shareholder is entitled to a fair dividend, but rather to an assertion that he may invest his dividends in improvement of the property and have it in cash also.

Certain aspects of the financial condition of the Lehigh Valley for the years 1901 to 1910, inclusive, are set forth in the following table:

LEHIGH VALLEY RAILROAD COMPANY.

Year ending June 30—

Item	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
Sec. A. MILEAGE:										
1. Owned—single track, miles.....	317.67	317.59	316.98	311.63	306.12	306.70	302.30	302.30	293.06	302.61
2. Owned—all tracks, miles.....	797.17	799.69	797.84	789.69	802.09	816.42	824.66	824.66	832.99	840.86
3. Operated—single track, miles.....	1,387.28	1,387.24	1,382.16	1,382.67	1,393.47	1,429.16	1,443.24	1,443.24	1,445.67	1,440.25
4. Operated—all tracks, miles.....	2,905.48	2,923.31	2,953.68	2,971.87	3,003.30	3,123.46	3,163.30	3,163.30	3,228.49	3,261.43
Sec. B. COST OF ROAD AND EQUIPMENT:										
Per mile owned—single track.....	\$37,657.712	\$37,657.712	\$46,426.650	\$46,426.650	\$48,410.162	\$48,410.162	\$54,365.714	\$54,365.714	\$58,533.942	\$61,443.218
Per mile owned—all tracks.....	118,543	118,550	146,450	149,009	157,115	157,842	178,840	178,840	194,395	203,044
Sec. C. TOTAL CAPITALIZATION:										
Per mile owned—single track.....	\$7,416,176	\$7,420,100	\$8,301	\$8,301	\$9,355	\$9,355	\$10,319	\$10,319	\$10,319	\$10,319
Per mile owned—all tracks.....	27,713.06	27,713.06	32,837.10	32,837.10	35,864.10	35,864.10	40,441.100	40,441.100	42,259	43,773
Capital stock.....	100,000	100,000	122,274	122,274	123,498	123,498	138,464	138,464	158,758	161,058
Funded debt.....	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100
Sec. D. TOTAL OPERATING REVENUES:										
Per mile operated—single track.....	17,049	17,062	18,455	18,455	21,692	22,426	24,480	24,480	25,854	26,469
Per mile operated—all tracks.....	8,141	8,197	8,698	8,698	10,067	10,228	11,176	11,176	11,593	11,698
Total operating expenses:										
Per mile operated—single track.....	18,676.927	18,103.254	18,377.822	18,253.917	18,446.280	18,682.636	21,700.358	21,700.358	22,541.146	23,214.256
Per mile operated—all tracks.....	13,462	13,771	13,301	13,106	13,283	13,772	15,036	15,036	16,587	16,835
Ratio to total operating revenues..... per cent.....	6,428	6,535	6,222	6,143	6,142	6,291	6,860	6,860	7,392	7,392
Analysis of operating expenses under official classification:										
Maintenance of way and structures.....	78.96	80.71	71.53	63.67	61.01	61.41	61.50	61.50	64.16	62.42
Per mile operated—single track.....	4,341.717	4,632.597	4,090.189	3,053.204	3,269.381	3,183.245	3,196.854	3,196.854	3,273.389	3,463.943
Per mile operated—all tracks.....	2,067	2,240	2,944	2,196	2,346	2,306	2,215	2,215	2,348	2,404
Ratio to total operating revenues, per cent.....	1,460	1,585	1,388	1,029	1,089	1,066	1,011	1,011	1,010	1,062
Maintenance of equipment:										
Per mile operated—single track.....	17.93	19.58	16.96	10.67	10.82	9.83	9.06	9.06	9.37	9.06
Per mile operated—all tracks.....	4,445.244	5,149.923	4,684.386	4,744.252	4,894.269	5,465.194	6,186.642	6,186.642	5,832.450	5,996.810
Ratio to total operating revenues, per cent.....	3,206	3,712	3,372	3,467	3,811	3,832	4,287	4,287	4,034	4,163
Per mile operated—single track.....	1,581	1,702	1,589	1,694	1,630	1,751	1,966	1,966	1,799	1,838
Ratio to total operating revenues, per cent.....	18.81	21.76	13.27	16.54	16.19	17.12	17.54	17.54	16.68	15.71

LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

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Item	Year ending June 30—									
	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
Traffic and transportation expenses.....	9,251,820	8,581,666	8,964,825	9,857,585	9,694,567	10,421,778	11,686,787	12,121,580	10,760,303	11,512,285
Per mile operated—single track.....	6,469	6,186	6,440	7,078	6,865	7,282	8,098	8,373	7,443	7,993
Per mile operated—all tracks.....	3,184	2,905	3,035	3,317	3,228	3,326	3,694	3,765	3,320	3,520
Ratio to total operating revenues, per cent.....	39.11	36.25	34.89	34.38	32.06	32.52	33.12	32.39	30.79	30.17
General expenses.....	735,146	738,677	618,533	595,895	587,011	621,218	630,076	637,940	708,764	713,149
Per mile operated—single track.....	530	513	445	428	421	436	436	441	491	495
Per mile operated—all tracks.....	253	253	210	201	195	198	196	198	219	219
Ratio to total operating revenues, per cent.....	3.11	3.12	2.41	2.08	1.94	1.94	1.78	1.71	2.03	1.87
Analysis of operating expenses between labor and other expenses:										
Compensation paid direct to labor.....	9,193,572	9,965,715	10,550,479	10,977,294	10,920,360	12,013,753	14,282,297	12,891,826	12,113,151	13,703,030
Per mile operated—single track.....	6,631	7,205	7,579	7,882	7,834	8,406	9,896	8,905	8,379	9,514
Per mile operated—all tracks.....	3,166	3,419	3,572	3,694	3,636	3,884	4,515	3,963	3,737	4,202
Ratio to total operating revenues, per cent.....	38.89	42.23	41.07	38.29	36.12	37.49	40.48	34.44	34.65	35.92
Compensation paid general officers.....	130,362	128,320	145,835	116,746	108,186	104,576	125,718	178,063	484,768	160,821
Per mile operated—single track.....	100	93	165	84	74	73	90	123	128	112
Per mile operated—all tracks.....	48	44	49	39	34	33	41	56	57	49
Ratio to total operating revenues, per cent.....	.59	.54	.66	.40	.34	.32	.37	.49	.53	.42
Material, fuel, and all other items.....	9,338,003	8,979,219	7,661,406	7,161,877	7,421,682	7,563,705	7,286,343	10,942,147	10,243,226	9,960,405
Per mile operated—single track.....	6,731	6,473	5,517	5,143	5,326	5,293	5,060	7,559	7,085	6,909
Per mile operated—all tracks.....	3,214	3,072	2,601	2,410	2,472	2,414	2,304	3,389	3,160	3,061
Ratio to total operating revenues, per cent.....	39.46	37.94	29.90	24.98	24.55	23.60	20.65	29.23	29.31	26.08

LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Item	Year ending June 30—									
	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
SEC. D. TOTAL OPERATING REVENUES—										
Continued.										
Taxes		\$285,781	\$289,986	\$471,262	\$538,933	\$468,849	\$960,501	\$850,361	\$750,494	\$734,998
Per mile owned—single track	983	901	915	1,512	1,749	1,529	2,185	2,812	2,575	2,627
Per mile owned—all tracks	392	358	364	589	672	575	801	1,020	937	946
Per mile operated—single track		296	208	338	387	328	438	588	540	552
Per mile operated—all tracks	107	98	98	159	179	150	209	253	241	244
Ratio to total operating revenues..... per cent.	1.31	1.21	1.13	1.65	1.78	1.47	1.87	2.27	2.23	2.09
Operating income	4,663,106	4,279,637	7,024,332	9,945,183	11,251,182	11,899,393	12,936,522	12,564,346	11,628,314	13,541,920
Per mile operated—single track										
Per mile operated—all tracks	3,392	3,065	5,046	7,141	8,072	8,326	8,956	8,679	8,044	9,402
Ratio to total operating revenue..... per cent.	1,606	1,464	2,378	3,346	3,746	3,797	4,086	3,892	3,587	4,152
SEC. E. INCOME ACCOUNT:	19,73	18,08	27,34	34,68	37,21	37,12	36,53	33,57	33,27	35,49
Operating income from rail-road operation	4,663,106	4,279,637	7,024,352	9,945,133	11,251,182	11,899,393	12,936,522	12,564,346	11,628,314	13,541,920
Additions to income: (total of items 1 and 2 following):	1,286,836	1,367,808	1,690,828	1,682,763	1,490,208	1,548,521	1,738,188	1,474,833	1,057,273	1,463,372
1. Rents received from other roads for the use of road, equipment, and facilities of the operating property										
2. Interest on bonds and dividends on stocks in separately operated railroads and income from other miscellaneous property	718,096	621,011	932,233	1,209,376	1,040,498	789,570	761,050	502,551 { 108,351 }	282,680	409,013
	568,738	746,797	636,256	473,387	453,010	806,851	945,138	856,921	764,643	1,064,359

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LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Item	Year ending June 30—									
	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
Deductions from income: (total of items 1, 2, and 3 following)	7,691,757	6,989,222	6,397,633	5,306,695	5,940,251	6,435,014	6,559,167	6,696,522	6,841,783	6,867,892
1. Rents paid for lease of roads which form a part of the operating property	2,724,019	2,743,965	2,757,328	2,332,434	2,410,967	2,453,296	2,247,253	2,520,523	2,748,305	2,783,893
2. Rents paid to other roads for the partial use of road, equipment, and facilities needed in operating the property	706,919	526,253	562,258	574,384	444,471	430,176	373,836	185,833	150,046	173,270
3. Interest accrued on funded and floating debt	3,660,819	3,709,384	3,018,047	3,000,277	3,084,813	3,549,582	3,838,019	3,960,178	3,942,659	3,830,729
Corporate income for the year Per cent on capital stock outstanding sec. C.	Def. 1,139,815	Def. 1,352,777	2,377,247	5,720,561	6,894,439	7,021,810	8,030,543	7,432,647	8,543,804	8,137,400
SEC. F. PROFIT AND LOSS ACCOUNT: Accumulated surplus brought forward from preceding year	2.82	3.29	5.88	14.14	16.82	17.36	20.61	18.38	14.45	20.12
Corporate income for the year	77,014	Def. 1,176,258	Def. 3,372,147	1,839,681	5,914,796	8,037,225	11,582,915	14,003,383	16,516,394	19,212,282
Discount on securities bought and sold and other profit	Def. 1,139,815	Def. 1,352,777	2,377,247	5,720,561	6,894,439	7,021,810	8,030,543	7,432,647	8,543,804	8,137,400
Total surplus available for distribution	-296,196	-861,112	+3,883,703	+38,554	-1,454,371	-1,403,971	-1,262,541	-719,059	-135,110	-309,617
Per cent on capital stock outstanding sec. C.	Def. 1,361,996	Def. 3,372,147	2,896,863	7,380,086	11,294,864	14,573,164	18,221,917	20,722,871	22,275,688	23,995,025
Dividends declared	3.37	8.34	5.14	18.25	27.49	28.04	45.06	51.24	54.98	66.06
Additions, betterments, and permanent improvement appropriations					1,225,969	1,624,622	2,144,044	2,430,763	2,439,163	2,480,703
Sinking and special reserve funds			1,266,182	1,479,320	2,411,550	1,570,227	2,008,550	1,363,834	580,206	843,877
Total surplus appropriated Per cent on capital stock outstanding sec. C.	Cr. 183,728		1,266,182	1,479,320	2,637,559	3,194,249	4,212,134	4,265,867	5,013,446	5,857,745
Unappropriated surplus carried over to the following year	45		3.19	5.91,796	6.82	7.50	10.42	10.40	7.45	.85
	Def. 1,176,258	Def. 3,372,147	1,620,681	5,914,796	8,057,325	11,880,315	14,003,383	16,516,394	19,212,282	21,219,780

68 The figures for years prior to 1901 are not given above because we have not had them revised to conform to the present system of accounting; but from 1895 onward they tell practically the same story—that is, the charges to maintenance of way from 1895 to 1904 were abnormal as compared with the years 1905 to 1910. During this 10-year period the density of tonnage per mile of line has increased about 30 per cent. Three of the large items of operating expenses, namely, maintenance of equipment; compensation to labor; and material, fuel and supplies, show an increase somewhat proportionate to the increase in density of tonnage; while the fourth large item of operating expense, maintenance of way and structures, has decreased from \$3,057 per mile in 1901 and \$3,340 in 1902 to \$2,404 in 1910. The only inference which can be drawn from these figures is that in the period from 1895 to 1902 the shareholders elected to devote surplus earnings to rebuilding and improving their road instead of distributing the earnings to themselves in the form of dividends. The excess of the maintenance of way item alone for several years prior to 1903 over that for 1910 was sufficient to pay a 2-per-cent. dividend on the stock. The devotion of earnings to permanent improvements and betterments was no doubt a wise policy on the part of those in control of the road. But the indications are that the shareholders have already received the benefit of that policy, even though it has not come in the form of cash dividends covering the period in question. From 1894 to 1903 the average market value of Lehigh Valley Railroad stock was in the neighborhood of \$75 per share. At this writing the same stock is quoted at \$178. Thus a person who had invested in Lehigh Valley at par prior to 1904, has benefited by an appreciation in value of his stock to the amount of 5 per cent. per annum since 1894 and has received dividends gradually increased from 2 per cent. to 5 per cent. since 1905. The earnings in 1910

69 were sufficient to pay a dividend of 20.12 per cent., but the company elected to increase its unappropriated surplus from \$19,212,252 in 1909 to \$27,219,890 in 1910. Moreover, the Lehigh Valley Railroad Company has been carrying amongst its assets certificates of indebtedness of the Lehigh Valley Coal Company amounting to \$10,537,000, upon which no interest is collected. Interest on this indebtedness would be sufficient to pay a 1-per-cent. dividend on the stock. We should hesitate to assent to defendant's first proposition that present shippers must bear the burden of earlier misfortunes of the road, but it is unnecessary to decide that point in this case because it has been sufficiently demonstrated that the shareholders have received a fair return on their investment, taking into consideration the money actually received in dividends, the increased value of their shares, the increased value of the property, and the large unappropriated surplus. It follows therefore that the allowance in the Wilgus estimate of 10 cents per ton to make up for this alleged deficit should be eliminated from the calculation.

Defendant's second and third contentions that the rates should be sufficient to guarantee a fair annual return on the investment and to provide reasonably for keeping the property up to improved mod-

ern methods are sound but have little bearing on this case, in view of the summary of the road's finances above set forth. It will be noted by referring to that tabulation that defendant's corporate income was sufficient to pay a dividend on the capital stock of 16 per cent. in 1905, 17 per cent. in 1906, 20 per cent. in 1907, 18 per cent. in 1908, 14 per cent. in 1909, and 20 per cent. in 1910. Instead of paying such dividends it has paid 5 per cent. on its capital stock appropriated to additions, betterments and improvements sur-
 ranging from \$580,206 to \$2,068,590 per annum, and his increase
 70 780 in 1910. Certainly it must be conceded that the present rates provide liberally for a fair annual return on the investment and the proper maintenance of the property.

As noted, the Lehigh Valley Railroad Company carries among its assets \$10,537,000 non-interest bearing certificates of indebtedness of the Lehigh Valley Coal Company. At 5 per cent. per annum the interest on these certificates would be \$526,850. The latter sum in all substantial respects a rebate to the Lehigh Valley Coal Company. The proportion of the total tonnage from the anthracite field shipped by the Lehigh Valley Coal Company does not appear, but it is of record that it ships about 95 per cent. of the coal to tidewater. If its proportion of the total traffic is the same as that of tidewater its tonnage for 1910 was in the neighborhood of 10,500,000 tons and the net result of the transportation as between it and its competitors was the same as if it had had its coal transported for 5 cents per ton less than the independent dealers. Referring to the same matter in *Coxe Brothers Co. v. L. V. R. R. Co.*, supra, the Commission said:

The railroad company advances to the coal company nearly \$1,000,000 with which to transact its business, and for the use of which the railroad company receives no advantage other than such advantages as it gets from carrying the freight of the coal company. The value of the annual use of such advances at 5 per cent. interest amounts to \$350,000, nearly. This sum exceeds 10 cents per ton on all the coal shipped by the coal company over the lines of the railroad company, and is to that extent an undue preference given to said coal company, to the disadvantage of Coxe Brothers & Company and other shippers who receive no advances. The advantage of such advances if made to complainants, estimated on their annual
 71 shipments, would exceed \$100,000. Had the Lehigh Valley Railroad as a means of securing freight made like advances to any other competitor of complainants, whether an individual operator or a coal company in which the railroad company had no interest, it would hardly be contended that such act did not amount to undue preference and unjust discrimination. The fact that the road was interested in the coal company, as the owner of its capital stock does not make lawful what would be unlawful without such interest.

Defendant has filed an exhibit purporting to show that its average revenue for the transportation of coal to Perth Amboy from 1898 to 1908 has been \$1.46 per gross ton. Assuming that by the loan to the coal company defendant loses interest charges amounting roughly to 5 cents per ton, the average just given would be reduced to \$1.

per gross ton. In the Coxe Brothers case, decided in 1891, the Commission decided that a fair return to defendant upon traffic here involved would be an average of \$1.40 per gross ton. The rates ordered as a result of that decision were never put in force because, whole litigation resulting therefrom was in the courts, it was decided that as the law then stood the Commission was without authority to fix a rate for the future. Since that decision density of tonnage has increased, the ratio of operating expenses to income has materially decreased, grades have been eliminated, train loads and car capacities have materially increased; in short, every factor which ought to make for lower rates has been present. But the rates charged have produced revenue of about 6 cents per ton in excess of that found reasonable by the Commission.

Turning again to the Wilgus exhibit, we find the estimated cost of transporting a ton of coal from the Wyoming region to Perth Amboy is \$1.49. But we have shown that 10 cents of that

72 amount, designed to cover past deficits, is an improper charge.

Therefore \$1.39 would be the cost if the exhibit were accurately and properly constructed on the basis of facts known to the witnesses. In considering this exhibit it must be remembered that the so-called cost does not mean operating expense. The item of \$1.49 is designed to cover all proper, possible, and probable charges, including not only interest and depreciation charges, but other items, such as the 10-cent allowance above mentioned. Therefore, if the exhibit were not open to objection, it would be seen that, after eliminating the 10-cent charge above referred to, defendant's rates on the several sizes of anthracite coal ought to bring them revenue averaging \$1.39 per gross ton. That is to say upon defendant's own showing it is collecting rates which have been on the average 7 cents per ton in excess of a reasonable rate.

After a careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy of 1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal, are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat. If the relative tonnage of the several sizes continues as it has in the past, the rates herein found to be reasonable would result in an average reduction in defendant's revenue per gross ton for hauling coal to Perth Amboy of about 11 cents below the figure of \$1.46 for the ten years from 1898 to 1908. As applied to 1908 the last year for which anthracite tonnage to Perth Amboy is shown in the record, the proposed rates would have resulted in reducing its operating revenue by

73 about \$247,000 and apparently 95 per cent. of this amount

would accrue to the benefit of the railroad coal company. By reference to the table above set forth it is at once apparent that such a reduction will have no serious effect on defendant's revenues and will afford ample allowance for interest charges, operation, dividends, and all proper reserve funds.

We are further of opinion that reparation should be awarded upon

basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case can not be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants.

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 8th Day of June, A. D. 1911.

Present:

Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

v.

LEHIGH VALLEY RAILROAD COMPANY.

74 This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby notified and required to cease and desist, on or before the 15th day of August, 1911, and for a period of two years thereafter to abstain from charging, demanding, collecting or receiving its present rates for the transportation of anthracite coal in carloads from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., as follows, to wit: upon prepared sizes \$1.55 per gross ton; on pea coal \$1.40 per gross ton; and on buckwheat coal \$1.20 per gross ton; which said rates have been found by the Commission in its said report to be unreasonable.

It is further ordered, That said defendant be, and it is hereby notified and required to establish, on or before the 15th day of August, 1911, and for a period of two years thereafter to maintain, and apply to the transportation of anthracite coal in carloads from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., rates not in excess of the following, to wit: \$1.40 per gross ton on prepared sizes of said coal; \$1.30 per gross ton on pea coal; and \$1.15 per gross ton on buckwheat coal; which said rates have been found by the Commission in its said report to be reasonable.

Order of Court.

Filed Sept. 3, 1912.

And now, September 3, 1912, the petition of Henry E. Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, in the above proceeding having been filed and the averments thereof considered, it is ordered that the Lehigh Valley Railroad Company be and it is hereby directed and ruled to file a plea, answer or demurrer to said petition within twenty days of the service of a copy of said petition, together with a copy of this Order, or judgment sec. leg.

J. W. THOMPSON, *Judge.**Plea.*

Filed Oct. 5, 1912.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The defendant, the Lehigh Valley Railroad Company, for a plea in the above stated case pleads Not Guilty; and further pleads the bar of the Statutes of Limitation applicable to the plaintiff's claim; and for further plea in this behalf defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding, and further that there was before the Commission no substantial evidence to sustain said findings and said order.

E. H. BOLES,
Solicitor for Defendant.

143 Liberty Street, Borough of Manhattan, New York City.

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Jury.

And afterwards, to wit, on the 11th day of November, 1912, a jury being called, comes, to wit:

Charles E. Wolle,
Jacob W. Klein,
Alexander Martin,
H. A. Walker,
A. Lincoln,
Francis X. Wolf,

Frankhouse,
George T. Van Norman,
Horace T. Greenwood,
Charles J. Pfifer,
Charles G. Gilmour,
Jacob D. Levan.

who are respectively sworn or affirmed to try the issue joined.

Verdict.

And afterwards, to wit, on the twelfth day of November, 1912, the jurors aforesaid upon their oaths and affirmations respectively do

say that they find for plaintiff and assess the damages at One Hundred and Nine Thousand Two Hundred and Eighty and 17-100 (\$109,280.17) Dollars.

Bill of Exceptions.

Be it remembered that at said September Sessions came the said plaintiff into the said Court and impleaded the said defendant in a certain plea of trespass, etc., in which the said plaintiff declared prout narr and the said defendant pleaded "not guilty." And thereupon issue was joined between them.

And afterwards, to wit, at a session of the said Court held in the District aforesaid, before the Honorable James B. Holland, Judge of the said Court, on the Eleventh day of November, 1912, the aforesaid issue between the said parties came to be tried by a jury of said

77 District for that purpose duly impaneled prout list of jurors, at which date came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff and defendant respectively offered evidence as follows:

Before Hon. James B. Holland, J., and a Jury.

PHILADELPHIA, Monday, November 11th, 1912.

Present:

William A. Glasgow, Esq., and John H. Hall, Esq., representing the plaintiff.

Everett Warren, Esq., Frank H. Platt, Esq., and Edgar H. Boles, Esq., representing the defendant.

Jury sworn or affirmed November 11th, 1912.

Evidence on Behalf of the Plaintiff.

HENRY EUGENE MEEKER, having been duly sworn, was examined and testified as follows:

By Mr. GLASGOW:

Q. You were a member of the firm of Meeker & Company, were you?

A. Yes.

Q. Who was the other member?

78 A. My mother, Caroline H. Meeker.

Q. During the pendency of the complaint that I will show you in a moment before the Interstate Commerce Commission, your mother died?

A. Yes.

Q. And the business was continued in your name as surviving partner of the firm?

A. Yes.

Q. Was your firm engaged in the coal business, and, if so, where?

A. Yes, sir; in New York City.

Q. Did you have an office there?

A. Yes.

Q. What was your business?

A. Merchandising coal?

Q. Buying and selling coal?

A. Yes, sir.

Q. Did you buy anthracite coal?

A. I bought anthracite coal at the breaker.

Q. Did you buy in the Wyoming Region prior to November 1st, 1900?

A. Yes.

Q. What coal did you buy?

A. I bought coal from the Stevens Coal Company, and several other coal companies.

Q. The coal which is the subject of the complaint here was the coal of the Stevens colliery, was it?

A. The majority of it was. But some of it came from other companies.

Q. But all of it came from that district?

A. All of it came from the Wyoming region.

Q. Where did you ship that coal?

A. I shipped the majority of it to Perth Amboy.

Q. The coal which is the subject of the complaint here is the coal which you shipped to Perth Amboy?

A. It is.

Q. During the time from November 1st, 1900, to August 1st, 1901, how were the rates which the Railroad Company was to receive upon the coal arrived at?

79 A. They were arrived at by taking a general average price received for prepared sizes, for pea and for buckwheat, by the Lehigh Valley Coal Company.

Q. At tidewater?

A. At Perth Amboy. Of that average price we were charged forty per cent.

Q. As the freight rate?

A. As the freight rate. That is, all except two months. I think the last two months they made a charge on a different basis. We were charged forty per cent., but for the last two months, as I recollect it——

Q. Then, was any question raised as to a readjustment? That forty per cent was called "adjusted" rates, was it not?

A. We were originally charged tariff rates, and then each month we received the same adjustment that the other shippers received.

Q. And they were called "adjusted rates"?

A. Yes, sir.

Mr. PLATT: As to these shipments alleged to *to* have been made

the 1st of November, 1900, and the 1st of August, 1901, as Mr. Glasgow has said, they are based upon Section 2 of the Interstate Commerce Act. That is to say, the allegation here is that the Interstate Commerce Commission made an award of damages, which is contained in the order of the Commission, which Mr. Glasgow has referred to, for acts of discrimination as distinguished from acts of overcharge. Those are the ones about which Mr. Meeker is being asked at the present time.

As to those, we raise certain questions of limitation, and if this is the proper point to present them, I would like to present them in objection to the testimony. If your Honor will hear an objection to the testimony on the ground that all of those that he is testifying to now are barred by the statute of limitations.

80 The COURT: Then, you object to this testimony on the ground that it is in support of a claim barred by the statute of limitations?

Mr. PLATT: Yes, sir.

The COURT: I will hear you on that. It is with reference to between November 1st, 1900, and August 1st, 1901?

Mr. GLASGOW: Yes, sir; and the complaint in the case before the Commission was filed on the 17th of July, 1907.

The COURT: Within six years?

Mr. GLASGOW: Yes, sir. You see, your Honor, the agreement as to the 65% and to pay it back did not take place until August 1st, 1901. The complaint was filed on July 17th, 1907. So that it runs back to July 17th, 1901, under any phase of the case.

Mr. PLATT: Yes; and, if your Honor please, I plead the five years' statute of the United States contained in Section 1047 of the Revised Statutes of the United States.

(Mr. Platt read Section 1047 of the Revised Statutes of the United States.)

(Mr. Platt also cited the case of Parsons vs. Railroad, 167 United States; and Carter vs. Railroad, U. S. Circuit Court of Appeals, Fifth Circuit, decided January, 1906.)

Therefore, our contention is that that ruling is just exactly on all fours with this case, as to these claims for discrimination between November 1st, 1900, and August 1st, 1901. The petition itself in the Commerce Court, if that fixes a date, was not filed until more than five years after August 1st, 1901. Of course, the filing of the complaint in this case—the filing of the petition is it called—

81 in this case before your Honor in this court, is the time that we contend controls the statute. That was not filed until the 3rd of September, 1912. But, in any event, even though it could be held that the time commenced to run—which I would not concede—that the filing of the petition in the Commerce Court was the material date, even though that were to be held, still that was not within five years.

In order to make the record perfectly clear, I move your Honor to strike out the testimony of the witness to the last two questions.

Mr. GLASGOW: I want to ask a question or two there, so the

objection can be properly made on the record. I do not think it is properly there now.

By Mr. GLASGOW:

Q. Did you have any conversation with any of the Lehigh Valley Railroad Company officers as to what rate you were to have on coal from the Wyoming region to Perth Amboy?

Mr. PLATT: I make the same objection to that.

Mr. GLASGOW: I want to prove what rate he was to get when he went there and shipped.

Mr. PLATT: I also object on the further ground that it is incompetent. It does not make any difference what arrangement he made. There was a schedule rate in force at the time.

The COURT: All of this, Mr. Glasgow, is in support of a claim that is now objected to upon the ground that the statute of limitations bars it.

Mr. GLASGOW: Yes, sir. I am just going to show your Honor the evidence that this has demonstrated the incorrectness of the view that this is a penalty or forfeiture. When Mr. Meeker went there to ship coal, prior to the time that this claim arose, he was told by the Lehigh Valley Railroad Company that he should have the same rate that everybody else had, and they violated that agreement with him. Of course, this is the first time that these gentlemen have ever had the temerity to present that the statute of limitations barred this over the United States statute, but this is an after-thought, which has never yet occurred in connection with it.

I want to show the circumstances under which he went to ship there and the fact that he was guaranteed by the officers that he would be treated as everybody else was treated, and that this suit is on the reparation order of the Commission, showing that he had been discriminated against and not treated as everybody else, and that they had violated the contractual rights that existed between the shipper and the carrier. It is not a forfeiture and not a penalty, but a violation of their contractual rights. If it amounts to discrimination the discrimination shows. That a man has been unjustly discriminated against shows that they have not observed that contractual right, which was to treat everybody equal and upon a parity.

The COURT: Do not all shippers make a bargain in the same way, and is not your claim for discrimination under Section 2?

Mr. GLASGOW: Yes, sir; that is correct.

The COURT: And you must stand upon your right to claim under Section 2?

Mr. GLASGOW: Exactly.

The COURT: And it depends on whether it is a forfeiture or penalty or not?

Mr. GLASGOW: Yes, sir.

82 The COURT: Nothing that was said as to what freight rate he would have had anything to do with it.

Mr. GLASGOW: Except that it shows that Meeker's relation to this company was the same as other shippers; that there was a con-

tractual right, and when they violated Section 2 they violated a contractual right.

The COURT: But you are not suing on the contractual right. You are suing on the right to claim under Section 2?

Mr. GLASGOW: Exactly.

The COURT: For what the defendant contends is a penalty. The objection is overruled, and the plaintiff will be permitted to prove that he made a contract to ship.

Mr. PLATT: Will your Honor allow me just a word further in regard to that? Of course, this petition here does not come to this court in such a condition as that. It represents no contract. There could not be a contract of that kind that would be valid, in the first place, and, in the next place, if he is suing on a contract, if this should be converted into an action on a contract, then the State statute of six years running from the 3rd of September, 1912, would apply.

Now, I want to say that this is no afterthought. We had no power to raise this five years' question at the time the case was before the Commission, because under our theory, according to our theory of the law, which I have no doubt is right, the time when the statute runs any way is from the time of the commencement of the action in this court.

The COURT: What he wants to show now is that he had a contract with the Railroad to ship on the same terms as other shippers.

84 Just what it has to do with the case we will not determine now, but I will permit him to prove it. The objection is overruled.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

(The following question read:

"Q. Did you have any conversation with any of the Lehigh Valley Railroad Company officers as to what rate you were to have on coal from the Wyoming region to Perth Amboy?")

A. Yes, I did; with Mr. George F. Taylor, the coal freight agent.

By Mr. GLASGOW:

Q. What was the understanding?

Mr. WARREN: May I not ask the witness to say the time when that conversation took place? I submit that he ought to be interrogated on that.

By Mr. GLASGOW:

Q. Can you give us the time?

A. It was in the month of November. Just after the strike.

By Mr. PLATT:

Q. November, 1900, you mean?

A. November, 1900, yes. When the question of advancing the prices to the independent operators at the mines was being discussed, and it was practically known in the trade at that time that

it had been agreed to give the independent operators sixty-five per cent.

Mr. PLATT: I move to strike that out. What was known to the trade.

(Motion sustained.)

By Mr. GLASGOW:

Q. You have fixed the time. Will you please state what took place on that occasion?

85 Mr. PLATT: We make the same objection.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

A. On that occasion I asked Mr. Taylor if the new rate to the independent operators of 65% became operative, if we would get the 35% rate, and he said, "Of course." In December, or, rather, during November we paid the tariff rate as usual——

By Mr. GLASGOW:

Q. Let me ask you: Did he say anything about how you would be treated on the basis of rates with reference to how other people were treated?

A. He said I would get the same as all. We were talking about the same as everybody else was getting at that time.

Q. On the basis of the rates which you paid during the period from November 1st, 1900, to August 1st, 1901, how much freight did you pay to the Lehigh Valley Railroad Company on shipments of coal from the Wyoming region to Perth Amboy? (Paper handed witness.)

Mr. WARREN: We would like to know what the paper is that is submitted to the witness.

Mr. GLASGOW: It is a memorandum of his.

Mr. WARREN: I assume it is a memorandum probably made up by his bookkeeper or somebody. I assume it is that, is it not?

Mr. GLASGOW: I suppose so.

Mr. WARREN: The schedule you are showing him is the schedule referred to the Commission, is it not?

Mr. GLASGOW: Yes, sir.

86 Mr. WARREN: On that we submit the witness ought not to be permitted to read from a paper that is not in evidence, and make certain deductions from it, the paper not having been in any way either identified or proved, or the correctness of the figure having been established in any way. In other words, it is pure hearsay testimony now.

The COURT: Now, we are right to the point where you were asking what amount he paid during this period, and all this testimony in support of this claim has been objected to upon the ground that the claim is barred by the statute of limitations. That objection was made to some questions that were asked some time ago. Now, it seems to me that the objection is properly applicable to this ques-

tion, and I will hear Mr. Glasgow in answer to the defendant, if they make that objection.

Mr. WARREN: We would like to interpose that objection. That is to say, that this evidence is incompetent—

The COURT: This is objected to upon the ground that it is in support of a claim barred by the statute of limitations?

Mr. WARREN: Yes, sir; as well as the other ground.

Mr. GLASGOW: If your Honor please, we have not gotten to the point where you can discuss the statute of limitations, for the reason that I have not yet shown when the complaint was filed before the Commission, and what their action was and their judgment. I have stated it in my argument, of course, but it has not been testified to.

Mr. PLATT: It is in the pleadings.

Mr. GLASGOW: It is in the pleadings, but I have not shown it. So that I have not reached the point where the statute of limitations could be discussed. I just want to show the fact and lead up

87 to the point, "Now, then, when did you first begin your action," and then it is in a position where the plea put it—it is not a demurrer—where the plea which the defendant offers can be considered. But I have not got now before the court on the record the facts as to when the claim originated. I am showing it now, and I am going to show when the first proceeding was taken to enforce their right, and following it with that.

The COURT: I do not think you ought to be permitted to prove your case before the defendant is permitted to interpose the plea of the statute of limitations.

Mr. GLASGOW: That is a plea.

The COURT: I know it is a plea, but it is defence, too, and they are interposing it in defence, and they can interpose it as soon as you begin your claim.

Mr. GLASGOW: I have no objection to passing on it now, if I can just get on the record the time when we first began our proceedings, so as to show when we were in court asserting our rights. I was leading up to that.

Mr. WARREN: The way to do that, I submit, would be to put in the order.

Mr. GLASGOW: I was following the usual way that I have tried cases where the statute of limitations was, put in your claim, show what your claim is, when you first began proceedings to enforce it, and then you have got facts upon which to say whether the statute applies; but until that is on the record I do not think it is in shape so that your Honor could pass on it, although I am perfectly willing to agree on that and let it go.

Mr. PLATT: May I suggest to your Honor that counsel is bound by his own pleading. His own pleading reads—

88 Mr. GLASGOW: Is that evidence, Mr. Platt? If it is, all right, let it go.

Mr. PLATT: It is evidence against you.

Mr. GLASGOW: But you are not putting in your case yet.

Mr. PLATT: I take it that counsel can hardly say that the ques-

tion of dates is not before the court, when he has pleaded it himself. He has pleaded this alleged discrimination as occurring between November 1st, 1900, and August 1st, 1901, the very thing about which he has been asking Mr. Meeker, in the third paragraph of his complaint.

The COURT: Of course, that is not yet in evidence, or before the Court. That would be all right for you to raise the question of the statute of limitations on the record, but that is not what you do. We will protect the defendant on the question of the statute, after he has proven when he started his suit.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

By Mr. GLASGOW:

Q. Can you tell the Court and jury what amount you paid to the Lehigh Valley Railroad Company during the period from November 1st, 1900, to August 1st, 1901, on shipments of coal from the Wyoming region to Perth Amboy?

A. \$129,989.18.

By Mr. WARREN:

Q. That is the aggregate sum you paid in freights?

A. That is the aggregate sum, yes.

By Mr. GLASGOW:

Q. That covered all sizes of coal?

89 A. It did.

Q. Can you tell us what was paid to the Lehigh Valley Railroad Company on that coal if you had been charged on the basis of 35% of the average selling price of coal by the Lehigh Valley Coal Company at Perth Amboy during the period which I have covered?

Mr. WARREN: We desire to interpose the same objections, both as to the competency of the witness, offering this evidence this way, and also upon the ground that it all has to do with items over five years prior to the institution of this suit, and, as an actual fact, more than five years prior to the institution of the proceedings before the Interstate Commerce Commission.

The COURT: What about the schedule he is reading from?

Mr. GLASGOW: It is merely a memorandum for refreshing his memory, made from his books.

The COURT: Just show what it is. There is objection made to it.

By Mr. GLASGOW:

Q. What is the paper that you have in your hand?

A. It is a paper giving the items, tonnages and amounts paid.

Q. Where was it made up?

A. It was made up in my office.

Q. Under your direction?

A. Under my direction.

Q. Do you know that it is correct?

A. I know it is correct.

Q. You made it up for what purpose?

A. I made it up for the purpose of this suit, or, rather, this case before the Interstate Commerce Commission.

The COURT: Do you still object to the paper?

90 Mr. WARREN: The fact is just as the witness has said, that that is the memorandum which he used in the proceedings before the Interstate Commerce Commission. In other words, when they come to offer the order, as they must, here, it speaks of Exhibit 2, and that is this paper, if it be the same as that, we do not interpose any technical objection.

Mr. GLASGOW: That paper that he has is exactly the same as was offered in evidence before the Commission, which the Commission found correct, and he is using it here for the purpose of refreshing his memory.

Mr. WARREN: As long as he says that that paper is the one used before the Commission, we withdraw the objection to it.

By Mr. GLASGOW:

Q. Can you tell me what was the amount which you would have paid on the same coal covering that period if you had been charged on the basis of 35% of the average selling price at Perth Amboy of coal sold by the Lehigh Valley Coal Company?

Mr. PLATT: We object to that. There is no evidence, if the Court please, before this Court that anybody else got 35% and he knows nothing about it.

Mr. GLASGOW: I cannot put in all my evidence at once.

The COURT: He has already testified that he talked with the Lehigh Railroad Company people, and they told him he was to get the same as the rest.

Mr. PLATT: But he has not proved that anybody else got any different rate.

The COURT: He said that they told him he was to get the same treatment, which was 65 and 35. The objection is overruled.

(Objection overruled.)

91 (Exception noted by defendant by direction of the Court.)

(The following question read:

"Q. Can you tell me what was the amount which you would have paid on the same coal covering that period if you had been charged on the basis of 35% of the average selling price at Perth Amboy of coal sold by the Lehigh Valley Coal Company?")

A. \$118,979.85.

By Mr. GLASGOW:

Q. What is the difference between the amount you paid and the amount you would have paid on the basis of the question immediately preceding?

A. \$11,009.33.

Q. Did you file a complaint in the name of Meeker & Company

with the Interstate Commerce Commission setting up a claim to the \$11,009.33, to which you have just testified?

A. I did.

Q. When did you file that complaint with the Commission?

A. On July 17th, 1907.

Q. Did the Commission make an investigation in regard to that complaint?

A. They did.

Q. Did they enter an order in regard to it?

A. They did.

MR. WARREN: Certainly, it is not competent for the witness to say what orders the Commission entered.

MR. GLASGOW: He did not say what order they entered. He said they entered an order.

The COURT: He has not said what order they entered.

92 MR. GLASGOW: I offer in evidence a certified copy of the report of the Interstate Commerce Commission, and of the order attached thereto, in the case pending before that Commission No. 1180, entitled "Henry E. Meeker and Caroline Meeker, co-partners, trading as Meeker & Company, against The Lehigh Valley Railroad Company," decided on June 8th, 1911, and the order entered on the 8th day of June, 1912.

MR. PLATT: If your Honor please, we have several objections to make to that. Our first objection is because the report shows on its face that the causes of action accrued more than five years prior to September 3rd, 1912, the date that the suit was brought, and was hence barred under the five years' Federal Limitation, under Section 1047 of the Revised Statutes, that being the same matter which your Honor has already heard.

MR. GLASGOW refers to the date of the commencement of the proceedings, and of course this objection is intended to cover, in any event, because even the commencement of the proceedings, as has been stated, before the Interstate Commerce Commission was more than five years after August 1st, 1901. I do not know whether your Honor wants to hear me further on that, but I think I have explained to your Honor just exactly what that objection is.

MR. GLASGOW: As to that question, it is disposed of by the Act perfectly under which this was brought. The Act to Regulate Commerce, under which this Act was brought before the Commission, provides that "all claims for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit

93 Court within one year from the date of the order and not after; provided that claims accrued prior to the passage of this Act may be presented within one year."

This Act was passed on June 29th, 1906, and became effective 60 days thereafter. All claims accruing prior to that were authorized to be brought within one year. That is the statute of limitations that applies to this case.

(Further argument.)

The COURT: This is too important a question to pass on offhand. I will overrule the objection and give the defendant an exception, and pass on it when we can go into it with some degree of care.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: There are other objections that I wish to present as to the admissibility of this report.

This proceeding was brought by Mr. Meeker primarily for the purpose of getting the rate fixed for the future, claiming that the existing rate was an unreasonable rate. The schedule rate of the company, the rate that the company was charging at the time Mr. Meeker brought his proceeding, was, on prepared sizes of coal from the Wyoming region to Perth Amboy, \$1.55; and on pea coal \$1.40; and on lower sizes than pea coal, buckwheat and the other sizes, \$1.20.

The Commission's order reduced the price on the prepared sizes which is about two-thirds of the product, from \$1.55 to \$1.40; and the price of the pea coal from \$1.40 to \$1.30; and buckwheat sizes from \$1.20 to \$1.15.

As I say, Mr. Meeker brought his proceeding before the Commission charging that that rate was unreasonable, and the Commission, having been given power, under the Hepburn Act of 1906, to fix future rates, he sought to have the rate for two years in the future reduced, and, incidentally, and in connection with that, he asked for a decision of the Commission, and obtained an order from the Commission as to the past, and divided into two parts, first as to the part between November, 1900, and August 1st, 1901, where he asked for an order finding discrimination, and as to the period between August 1st, 1901, and the time when he commenced his proceeding, July 17th, 1907, when he asked for reparation on the ground that he had been injured by overcharges.

Now, if your Honor will pardon me for explaining that to you. I wanted to get these points just clearly before your mind in reference to these objections that will be made.

Mr. GLASGOW: Is that an objection?

Mr. PLATT: No; I am just explaining it to the Court.

The COURT: He is just leading up to the objection.

Mr. PLATT: The order which Mr. Glasgow offers in evidence at the present time relates only to the future rates, and the report reserves the question of reparation for future action.

Now, we object to that part of the report which relates to shipments prior to September 3d, 1906, on the ground that claims accruing prior to that date are barred by the Pennsylvania statute of limitations.

(Objection overruled.)

(Exception noted for defendants by direction of the Court.)

Mr. PLATT: We object also to the admissibility of the report, in so far as it relates to shipments prior to July 17th, 1902, as barred by the United States statute, Section 1047.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: We object, further, this objection being included in the argument that has been made, to that part of the original report which relates to shipments between November, 1900, and August 1st, 1901, on the ground that it is inadmissible evidence because the Commission was without power to make such an order, for the reason that the cause of action was barred by the federal five years' statute, Section 1047, prior to the time when the proceeding commenced before the Commission, the same being for discrimination under Section 2, of the Commerce Act, and therefore being penal causes of action.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: We object to so much of the original report as relates to the rates prior to June 29th, 1906, on the ground that the Commission has no jurisdiction. Section 16 provides that claims accruing prior to June 29th, 1906, the date of the passage of the act, must be made the subject of a proceeding before the Commission within one year before the passage of the act, the complaint not having been presented within one year after the passage of the act, to wit, July 17th, 1907.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I object also to so much of the report as relates to the period prior to July 17th, 1905, on the ground that the Commission had no jurisdiction. Section 16 provides that claims accruing within two years prior to the passage of the act might be filed with the Commission within a year after the passage of the act. Since the complaint was not filed until July 17th, 1907, or more than one year after the passage of the act, the Commission had no jurisdiction of claims accruing prior to the two years' period, or prior to July 17th, 1905.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to so much of the report as relates to the period prior to August 28th, 1904, on the ground that the Commission had no jurisdiction.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to so much of the report as relates to the period prior to June 29th, 1904, on the ground that the Commission had no jurisdiction.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to the admission of the original report in evidence, on the ground that the statute under which the report is offered in evidence, the Interstate Commerce act, Section 16, is unconstitutional, in that it deprives the defendant of due process of law, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for reparation for damages to a petitioner before that body, and then

provide that on the trial of a suit to recover such alleged damages the finding and order of the Commission shall be *prima facie* evidence of the facts therein stated.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to the admission of the order and report in evidence on the ground that the report is invalid because on its face it purports to regulate commerce which was completed before the time when the order was made, and which was, therefore, not the subject of regulation.

In other words, if the Court please, I urge this with a great deal of confidence. The power to regulate commerce is a power that applies to the future, not to the past. Commerce that has been transacted is not a subject of regulation. It is not possible to regulate it. The regulation of commerce means the laying down of the rules by which commerce shall be conducted, and when Congress delegated to the Interstate Commerce Commission power to fix rates, it delegated to it a legislative or administrative act, and it could act as to the future. It could lay down the rule, and it could fix the rate, perhaps, as to the future; but what is there within the power to regulate commerce that enables Congress or the Interstate Commerce Commission to regulate the thing which has already occurred and been done? The most that can be done would be to pass some act which related to the recovery of the damages or recovery on a contract; but Congress has no power, under the power to regulate commerce—it cannot
 98 have the power, it inherently cannot have the power, and under the power to regulate commerce, to regulate something that has happened and been ended and has gone over the dam.

Therefore, I say the report, in so far as it relates to the past, is invalid and of no force, and an order cannot be based upon an invalid report.

Mr. GLASGOW: That has been expressly decided by the Supreme Court. It goes to the whole question, as to whether the Commission can really regulate at all. Of course, the Commission cannot regulate charges for the future. It is bound to be for the past. Now, this proposition is that it cannot regulate it at all.

Mr. PLATT: My proposition is this: that an order which undertakes to regulate something in the past is not an order regulating commerce.

Mr. GLASGOW: I understand your proposition is that you cannot award any reparation for past transactions?

Mr. PLATT: You cannot regulate past transactions.

Mr. GLASGOW: You cannot regulate reparation for past transactions. That is your proposition, is it not? Isn't that it? That is as I understand it. I do not want to misunderstand your proposition. It is that you cannot award reparation, that you cannot make any order which relates to past transactions?

Mr. PLATT: My proposition is that this order, this award in the report, purports to be based on a report that undertakes to perform an impossibility, undertakes to regulate something that has already occurred, and it is not the subject of regulation. It cannot be reg-

lated any more than I can regulate the things that I did yesterday.

99 Mr. GLASGOW: It comes down to the proposition that your position is that the Commission, as applicable to this case, cannot award reparation on account of past transactions? Isn't that the correct statement of your proposition?

Mr. PLATT: I have stated it.

Mr. GLASGOW: Isn't that it?

Mr. PLATT: I have stated it.

Mr. GLASGOW: That is what I understand it to be. Of course, if he is a little touchy about restating it——

The COURT: The objection is upon the ground that the Interstate Commerce Commission cannot regulate past transactions. The answer is that they did not do that. If the objection is that they cannot award reparation then, the Supreme Court has passed on it.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object on the ground that the order and report would take from the Court its judicial power to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and, further, in fact, it would impose upon this Court as evidence in this case that which is not legal evidence, and, further, would impose upon the Court as findings of the Commission conclusions not based on the findings.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

100 Mr. PLATT: I also object on the further ground that the alleged findings of the Commission are invalid and unconstitutional, in that they have the effect of depriving the defendant of its constitutional right to a trial by jury.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to the report of June 8th, 1911, because it contains no findings of fact, as required by the statute. It contains not a single finding of fact upon which reparation of award can be based, or which is material, or relevant, in a reparation suit.

Mr. GLASGOW: There are certain findings of the Commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the Commission may make.

Mr. PLATT: This is offered in evidence as a whole. It is either admissible or it is inadmissible, and I challenge my friend to find the findings of fact in that report on which a reparation order of award can be based.

Mr. GLASGOW: Here are two of them.

The COURT: Just let me see what findings they made upon the award of reparation.

Mr. GLASGOW: In the first claim they say, "We are of opinion

and so hold that the complainants have sustained the allegation of unjust discrimination, under the second section of the act." That is on page 137. That is a finding of fact.

On page 162 they say, "After careful study of the defendant's exhibits relating to tonnage and cost of movement, as well as a painstaking analysis of defendant's voluminous exhibits respecting its past and present financial condition, we are of opinion and so find that the defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20 on buckwheat coal, are unreasonable, so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat."

The COURT: Then is there a calculation of the tonnage there?

Mr. GLASGOW: It all follows in the order of reparation.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object, because the report contains many statements purporting to be statements of evidence on the hearing before the Interstate Commerce Commission, arguments, opinions and conclusions, which the statute does not purport to make admissible as prima facie evidence.

Mr. GLASGOW: In reply to that, I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, and statements of a historical character which I think, under the cases, the Court should control in submitting the case to the jury, and direct their attention to the facts formed in the report.

The COURT: Then your idea is simply to offer the report in evidence for the purpose of proving that there was an order made and all relevant material in support of that evidence?

102 Mr. GLASGOW: Yes, sir.

The COURT: The Court will, of course, indicate to the jury what of the report is relevant.

(Objection overruled.)

(Exception noted for defendant, by direction of the Court.)

Mr. PLATT: I would like to know whether Mr. Glasgow does offer the whole report or whether he does not offer the whole report.

Mr. GLASGOW: There cannot be any doubt about that. I have offered the report, and you are making your objections to it, and the Court has said that he will control it by such direction as he may give to the jury with respect to the matters contained therein.

Mr. PLATT: Do I understand that that is the position that the Court takes, and that that statement is correct.

The COURT: That is the position that the Court takes. It seems to me that unless that is done an Interstate Commerce Commission report could scarcely ever get before a jury.

Mr. PLATT: It never ought to be gotten before a jury, if your Honor please, except in so far as the statute says so.

The COURT: That is another question. We will not go into that now, whether it ought or ought not.

Mr. PLATT: I understand that is the question that he means to raise. Maybe your Honor's and my minds are not running together. The point I make is that the report contains a very different thing from that which the statute authorizes.

The COURT: If it does, that will be considered. You have
103 your objection made, and an exception is noted, and we will consider it when we have time to look into it more carefully. You get the advantage of that, if what you say is correct, and that it has no right to go in.

Mr. PLATT: I also object on the further ground that the statements contained in the report, if held to be findings of fact, are so confused with other matter as not to be distinguishable or separable. (Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object on the further ground that the report has no bearing of competency in connection with an action for damages, because it does not set forth the alleged causes of action on which the award purports to be made up. In fact, the original report specifically reserves all such statements to a subsequent order.

The COURT: We will take a recess now until 2 o'clock.

At 1 o'clock P. M. the Court took a recess until 2 o'clock P. M.

2 P. M.

(Last objection read.)

Mr. GLASGOW: I do not understand that objection.

Mr. PLATT: Each one of these shipments constitutes in itself a separate cause of action that is here before the Court, and the report fails in any way to set those forth. The report makes no allusion at all to them—I am now referring to the original report—except to reserve them for a subsequent order, and there is no finding of
fact as to any specific cause of action.

104 The COURT: What does the report say which has reference to reserving that for future orders?

Mr. PLATT: "We are further of opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants." Then there is a subsequent hearing and a subsequent report on the subject of reparation.

The COURT: Is that in evidence?

Mr. GLASGOW: No, sir; it has not been offered yet. It follows this. The report is now offered as to the first claim, where unlawful discrimination was charged, and the Commission finds: "We are of the opinion and so hold that complainants have sustained the allegation of unjust discrimination under the second section of the act. Reparation, with interest from August 1, 1901, will be awarded on this account." Then as to the claim of unreasonable rates, the Commission finds that the rates were unreasonable, but "the amount

of reparation which should be awarded under our findings in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants." Then we went before the Commission with a statement of the shipments, each shipment, the time that it was made, tabulated form of the interest on that shipment and the cost on each shipment, which had been gone over by defendant's counsel and agreed to as correct statement.

105 and then the Commission filed the report setting forth what is the amount of the reparation which they find, saying, "The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved. Orders will be issued in accordance with the findings herein announced."

The COURT: Is that in evidence?

Mr. GLASGOW: I am going to follow this first report with the second.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We make the further objection to the order now offered in evidence—that is, the order of June 8, 1911—on the ground that it is wholly irrelevant and immaterial. That is the order, if your Honor please, that fixes the future rate and which has no allusion in it at all to the reparation.

The COURT: You object to the order which fixes the future rate?

Mr. PLATT: Yes. That is what is offered.

The COURT: The order is offered for the purpose of proving the amount of reparation.

Mr. PLATT: It does not tend in any way to prove it. Perhaps your Honor has it a little confused. The order which fixes the future rates, which was entered in June, 1911, was the order which ordered the defendant to desist from charging the rates it had been 106 charging in the past, and directing it to put into effect the rates which the Commission found.

The COURT: That is part of the finding in the whole order?

Mr. PLATT: No, sir. There are findings——

The COURT: It is part of the report?

Mr. PLATT: No, sir; if your Honor please, the Commission made their report, which purports, I suppose, or which it is claimed, contains the findings. Then they made an order as to future rates. There is nothing in the statute that I know of that admits that in evidence.

The COURT: Mr. Glasgow, is the Commission's order fixing future rates in the same paper in which they order reparation?

Mr. GLASGOW: No, sir. It is an order of this kind——

The COURT: Have you offered that in evidence?

Mr. GLASGOW: I merely offer that in evidence to show that the Commission not only found the rates unreasonable, but did not rest

there, but carried it into an actual order that the rates should be decreased in accordance with this finding. In other words, the report that the Commission makes has no actual value, so far as decreasing the rates are concerned. It merely is *prima facie* evidence. Now I follow that with the order which directs the carrier to follow the finding of the Commission and reduce the rate.

The COURT: For what purpose? For the purpose of showing it is an unreasonable rate?

Mr. GLASGOW: Yes, sir; and, as a matter of fact, the Commission ordered them to reduce it, and I expect to follow that by showing they did reduce it.

107 Objection overruled. Exception noted for defendant by direction of the Court.

Mr. GLASGOW: I ask that the report of the Commission of June 8, 1911, together with the order thereto attached of June 8, 1911, in case No. 1180, be marked as plaintiff's exhibit No. 1.

(Papers marked Plaintiff's Exhibit No. 1, November 11, 1912.)

Mr. PLATT: This order which Mr. Glasgow offers comes certified under the date of June 8, 1912, which is a clerical error. June 8, 1911, is right, and I concede that.

Mr. GLASGOW: I offer now, if your Honor please, the report of the Interstate Commerce Commission in case No. 1180 Henry E. Meeker and Caroline H. Meeker co-partners, trading as Meeker & Company, against the Lehigh Valley Railroad Company, submitted February 27, 1912; decided May 7, 1912; being supplemental report of the Commission, together with the order of the Commission entered on the 7th day of May, 1912, in the same case, No. 1180, in which the amount of reparation was fixed and awarded.

Mr. PLATT: I have certain objections to make to those. Some of those objections are the same, and I assume, of course, that they will take the same course.

The COURT: Do all those objections which you made to the first report apply to these other two reports?

Mr. PLATT: Not all of them, no, sir. We object to the admission of this supplemental report on the following grounds:

That the statute under which the supplemental report is offered in evidence, Interstate Commerce act, Section 16, is unconstitutional in that it deprives the defendant of due process of law.

108 Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the report is invalid because on its face it purports to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the alleged findings of the Commission are invalid and unconstitutional in that they have the effect to deprive the defendant of its constitutional right of a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the findings take from the Court its judicial power to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and further, in effect, impose upon this Court as evidence in this case that which is not legal evidence, and further to impose upon this Court as findings of the Commission conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the supplemental report of May 7, 1912, is inadmissible as a whole (1) because it contains no findings of fact as required by the statute; it contains not a single finding upon which a reparation or award can be based or which is material or relevant in a reparation suit.

The COURT: As I understand, it is simply a fixing of the amount upon a statement which was agreed to by both sides. Is that correct?

Mr. GLASGOW: Yes, sir.

109 Mr. PLATT: It states a lot of conclusions. I do not think there is a finding of fact in it.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: Second, because it contains incorrect statements as to the contents of the original report, the original report being the best evidence, if the subject matter of such statements is relevant or material to the issues.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the report has no validity or effect as evidence in this action for damages, because it does not set forth the alleged causes of action of which the award purports to be made up. The supplemental report simply gives as a conclusion the total tonnage and total freight payments, and does not set forth any single cause of action.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That it appears on the face of the supplemental report that the total amount found by the Commission to be the amount of the alleged damages was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907; that each of such shipments is the basis of a separate cause of action, and the report is inadmissible as not specifying as to each the amount awarded by the Commission; that the report fails to state as to each shipment the amount found due by the Interstate Commerce Commission, and, therefore, the report is not, under Section 16, prima facie evidence as to any of the causes of action here sued upon.

110 Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to so much of the report as relates to the period prior to June 29, 1906, on the ground that the Commission

has no jurisdiction. Section 16 provided that claims accruing prior to June 29, 1906, the date of the passage of the act, must be made the subject of a proceeding before the Commission within one year of the passage of the act; the complaint having been filed more than one year after the passage of the act, to wit, July 17, 1907.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to so much of the report as relates to the period prior to July 17, 1905, on the ground that the Commission had no jurisdiction. Section 16 providing that claims accruing within two years prior to the passage of the act might be filed with the Commission within a year after the passage of the act, since the complaint was not filed until July 17, 1907, or more than one year after the passage of the act; the commission has no jurisdiction of claims accruing prior to the two-year period, or prior to July 17, 1905.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to so much of the report as relates to the period prior to August 28, 1904, on the ground that the Commission had no jurisdiction.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to so much of the report as relates
111 to the period prior to June 29, 1904, on the ground that the Commission had no jurisdiction.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to that part of the report which relates to shipments prior to September 3, 1906, on the ground that all claims accruing prior to that date are barred by the Pennsylvania statute of limitations.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to that part of the report which relates to shipments prior to July 17, 1901, on the ground that all claims accruing prior to that date are barred by the Pennsylvania statute of limitations.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to that part of the report which relates to shipments prior to July 17, 1902, on the ground that all claims prior to that date are barred by Section 1047 of the revised statutes of the United States.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to the report because it shows on its face that the causes of action accrued more than five years prior to September 3, 1912, the date this suit was brought, and are hence barred by Section 1047, of the Revised Statutes.

Objection overruled. Exception noted for defendant by direction of the Court.

112 Mr. PLATT: We object to that part of the report which relates to shipments between November 1, 1900, and August 1, 1901, as inadmissible in evidence, because the Commission was without power to make such report, for the reason that the causes of action upon said shipments were barred by the Federal Five Years' Statute, Section 1047, Revised Statutes, prior to the time when the proceedings were commenced in the Commission, the same being for discrimination under Section 2, of the Interstate Commerce Act, and, therefore, being penal causes of action.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to the admission of the supplemental report further because it fails to state what part of the amount specified was on shipments made within the period of limitation applicable, and what part was awarded on shipments occurring before the period of limitation applicable, and, therefore, fails to show what transactions were within the power of the Commission.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We further object to the admission of the report now offered because it contains statements purporting to be statements of evidence on the hearing before the Interstate Commerce Commission, arguments, opinions and conclusions which the statute does not purport to make admissible as prima facie evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to the order now offered in evidence on the ground that it is not competent as evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

113 Mr. PLATT: We object to the order now offered on the ground that the statute under which the order is offered in evidence, the Interstate Commerce act, Section 16, is unconstitutional in that it deprives the defendant of due process of law, it not being within the power of Congress to provide, by legislative enactment, that the Interstate Commerce Commission can make findings upon which there may be a claim for reparation of damages to a petitioner before that body, and then provide that, on the trial of a suit to recover such alleged damages, the finding and order of the Commission shall be prima facie evidence of the facts therein stated.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object further to the order on the ground that it is invalid and unconstitutional in that it has the effect to deprive the defendant of its constitutional right of a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object further on the ground that the order takes

from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and further in effect imposes upon this Court as evidence in this case that which is not legal evidence and further to impose upon this Court as findings of the Commission conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object further to the order on the ground that it is invalid because on its face it purports to regulate commerce which was completed before the time when the order was made and which, therefore, was not subject to regulation at that time.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We further object to the order on the ground that the award made in the reparation order is not based on the findings of fact required by the Interstate Commerce act, as the act requires that, in case damages are awarded, such report shall include the findings of fact on which the award is made, and the report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff prior to July 17, 1907, were unreasonable.

The COURT: This is a supplemental act, and both acts go together. The supplemental act is the entry of the amount which was agreed upon, as I understand.

Mr. PLATT: The only thing that was agreed upon, or appears to be agreed upon, was that the figures contained were correctly made up in the schedule that was referred to.

The COURT: That is what I understand.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to the admission of the order on the further ground that it appears on the face of the order that the total amount ordered by the Interstate Commerce Commission to be paid was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907; that each such shipment is the basis of a separate cause of action and the order is inadmissible as not specifying as to each the amount awarded by the Commission; that the order fails to state as to each shipment the amount found due by the Interstate Commerce Commission, and, therefore, the order is not, under Section 16, prima facie evidence as to any of the causes of action here sued upon.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: I wish to make each and all of the same objections to the order that is now offered in evidence that I have just made previously as to the report now offered in evidence, relating to matters of limitation. I think perhaps, with the permission of the Court, if I may make those objections in that way, without reading them in detail, it will save the time of the Court.

The COURT: You want these objections to apply to what?

Mr. PLATT: I want the objections that I made to the supplemental report, which is now offered in evidence, so far as there were objections arising out of statutes of limitation, to apply also as objections to the order that is now offered in evidence.

The COURT: Let it be understood that they shall apply as suggested by counsel, without reading them, and that as to each of them there shall be the same ruling and an exception for the defendant.

Mr. PLATT: As to the order, I wish further to make the general objection that it is irrelevant and immaterial.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. GLASGOW: I offer this report and order, and ask that
116 it be marked Plaintiff's Exhibit 2; that is, the supplemental report and order directing reparation.

(Papers marked Plaintiff's Exhibit 2, November 11, 1912.)

Mr. GLASGOW: I offer the order of the Interstate Commerce Commission, dated June 15, 1912, case No. 1180, Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, against Lehigh Valley Railroad Company, supplemental order. The only difference, I think, there is between this order and the former order offered is that it changes the date from the 15th day of July, 1912, upon which payment was required in the former order, to August 1, 1912; in other words, extending the time of payment as required of the defendant until August 1st.

Mr. PLATT: We make each and all of the same objections to the admission of this order that we did to the last previous order, which has been marked Plaintiff's Exhibit 2.

The COURT: Let all the objections apply to this order. They are overruled, and an exception granted the defendant as to each.

(Report offered marked Plaintiff's Exhibit 3, November 11, 1912.)

Mr. GLASGOW: It was agreed by counsel for the defendant that the reports and orders which I have offered in evidence as Plaintiff's Exhibits 1, 2 and 3 were duly served upon the Lehigh Valley Railroad Company. That was admitted, as I understand, by your letter.

Mr. PLATT: Yes.

Mr. GLASGOW: I would like that to appear of record, that counsel admit the service.

Mr. PLATT: We so admit.

117 Mr. GLASGOW: Counsel for the defendant admit that the Exhibit No. 1, being report and order of the Interstate Commerce Commission, was duly served upon it upon July 1, 1911?

Mr. PLATT: Yes, I admit that.

Mr. GLASGOW: That Exhibit 2 was duly served upon it upon May 25, 1912?

Mr. PLATT: Yes, I admit that.

Mr. GLASGOW: And that Exhibit No. 3 was duly served upon the defendant upon June 27, 1912?

Mr. PLATT: I admit that.

(Examination of witness resumed.)

By Mr. GLASGOW:

Q. You are the same Henry E. Meeker who was a party to this complaint before the Interstate Commerce Commission?

A. Yes.

Q. Did your firm and yourself as surviving partner, during the period covered by the complaint, from August 1, 1901, to July 17, 1907, pay to the Lehigh Valley Railway Company the published rates which were found by the Commission to be unreasonable?

A. I did.

Mr. PLATT: I object, if your Honor please, and move to strike that out. The question assumes something which was not found by the Commission. There is not any finding anywhere that the amounts that he paid were found to be unreasonable. I object to the last part, "which were found to be unreasonable."

Mr. GLASGOW: Strike out the question.

By Mr. GLASGOW:

Q. Will you kindly tell us what rates you paid on coal, 118 you and your firm, from August 1, 1901, to July 17, 1907, on shipments of coal from the Wyoming region to Perth Amboy, stating the rates on the several sizes?

A. On prepared coal I paid \$1.55 per ton.

Q. Per gross ton?

A. Per gross ton. On pea coal I paid \$1.40 per gross ton.

Q. Buckwheat?

A. Buckwheat coal I paid \$1.25 part of the time and part of the time \$1.20.

Q. Since the order of the Interstate Commerce Commission went into effect what rates have you paid?

Objected to as irrelevant.

Objection overruled. Exception noted for defendant by direction of the Court.

A. \$1.40 prepared.

Q. These gentlemen do not know as much about coal as you do. Tell us what you mean.

A. On prepared sizes of coal which means broken, egg, stove and chestnut sizes, \$1.40 has been the rate from the Wyoming Region to Perth Amboy. On pea size \$1.30 and on buckwheat \$1.15.

Q. Between the first day of August, 1901 and the 17th day of July, 1907, can you state what amount of coal of the sizes that you have mentioned was shipped by you or your firm from the Wyoming region to Perth Amboy?

Objected to as calling for a conclusion. The question is what shipments he made and he should specify the shipments that he made.

Objection overruled. Exception noted for defendant by direction of the Court.

By the COURT:

Q. Can you state the amount?

A. Yes, I can.

119 By Mr. GLASGOW:

Q. Please state it.

Objected to as calling for a conclusion.

The COURT: Where did he get it from?

By Mr. GLASGOW:

Q. Where did you get that statement from?

A. From the statement made up in my office and checked by the Lehigh Valley officials.

Q. Did you go over it with the Lehigh Valley officials?

A. I did.

Q. Did they approve it or disapprove it?

A. They approved it, as far as I have it here.

Q. Approved it as correct?

A. Approved it correct.

By Mr. PLATT:

Q. You mean that, as appears in the statement that you have in your hands, they approved it?

A. Yes.

Mr. PLATT: It is the statement that he has in his hand, the detailed amounts, that is admissible, and that is all.

The COURT: He is going to state from that statement what the amount is. The statement will not speak to the jury itself, will it?

Mr. PLATT: It does state each separate cause of action there is here.

Objection overruled. Exception noted for defendant by direction of the Court.

By the COURT:

Q. Go ahead, tell us what the amount is.

A. Prepared sizes, 246,870 tons 15 hundredweight. Pea coal, 106,051 tons 9 hundredweight. Buckwheat coal, 87,250 tons.

By Mr. GLASGOW:

120 Q. Were all of those shipments made under the rates you have mentioned of \$1.55 on prepared sizes, \$1.40 on pea coal and \$1.25 and \$1.20 on buckwheat?

A. Yes.

Q. Have you calculated what would be the difference between the amounts which you paid and the amounts which would have been paid if you had been charged \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat?

A. Yes.

Q. Will you please state what it is?

Mr. PLATT: I object to that as incompetent. It is a conclusion, and moreover it does not necessarily constitute the measure of damage in this case.

Objection overruled. Exception noted for defendant by direction of the Court.

Q. Please state it.

Objected to. Objection overruled and exception noted for defendant by direction of the Court.

A. \$58,236.45.

Q. Did you calculate the interest on that from the several dates of payments and shipments up to the 1st day of September, 1911?

A. Yes.

Q. What did that amount to?

A. \$27,750.64.

Q. Has any part of that excess been paid to you by the Lehigh Valley Railroad Company.

A. No.

Q. Or the interest on it?

A. No.

Q. Has any part of the \$11,009.33 or the interest on it been paid to you?

A. No, sir.

The COURT: Are there any reports from the Interstate Commerce Commission as to that last report?

121 Mr. GLASGOW: It is in the ones that have been offered. I just wanted to identify the fact that the payments were made by his firm.

Cross-examination.

By Mr. PLATT:

Q. Will you let me take the paper you have been reading from? (Paper handed to Mr. Platt.) You have been testifying from a document which you held in your hand while you testified and which I now have here. What is this document?

A. That is a statement showing the shipments each week since August 1, 1901, of the different sizes of coal from the Wyoming region consigned to us at Perth Amboy?

Q. That is a statement that was prepared in your office?

A. It was prepared from the Lehigh Valley bills, which we had in our office.

Q. Prepared from the Lehigh Valley bills in your office.

A. Yes.

Q. And when you say that it relates to the period after August 1, 1901, you mean the big sheets?

A. Those are the large sheets, yes.

Q. What are the small sheets?

A. The small sheets are from November, 1900, to August, 1901, and that statement there is made up based on the monthly shipments.

Q. Is that a copy of the document that was prepared and used before the Interstate Commerce Commission?

A. It is one of the copies that was made at that time, yes. I do not know but this is the original.

Q. The order of May 7, 1912, which has been offered in evidence refers to an itemized statement known as "Complainant's Exhibit 2" before the Commission. Is this document that we are referring to now that Exhibit 2 that is referred to in that order?

122 A. I could not say.

Q. You were present, were you not?

A. I do not know what number it is before the Commission. I have no recollection of that.

Q. Will you look at the order and see if you have any doubt as to whether that is the statement that was before the Commission and which is the statement referred to in that order?

A. Those evidently are the large sheets of paper and not the small ones.

Q. The Exhibit 2 referred to in the order refers to the large sheets of paper that we have been talking about?

A. All the large ones excepting these back to here. That is the other claim.

Q. All of the large sheets bearing the dates in the first column from August 6, 1901 to July 2, 1907, are the sheets which constituted the Exhibit 2 referred to in the order?

A. Yes.

Mr. PLATT: Will you offer that, Mr. Glasgow?

Mr. GLASGOW: I will let you offer it.

Mr. PLATT: I will have it marked for identification.

Mr. GLASGOW: When your time comes, you offer it in evidence. I do not want to encumber the record. I have no objection to it. We will let you have this copy, if you want to introduce it.

Mr. PLATT: I think, if your Honor please, I will have that marked for identification, and then there will be no question about that being the document he has on the record.

Mr. GLASGOW: If you are going to raise objections of that kind, I will say that I have not offered it, Mr. Platt has a copy of it, and

123 I will let it rest with the witness. Out of courtesy I offered to give it to him if he wanted to offer it, but I do not care about my record being complicated by his marking exhibit he may want to offer.

Mr. PLATT: I think I have a right to have it marked for identification so we can have it appear upon the record, when I do offer it, that it is the document that the witness was referring to when he was testifying.

The COURT: I think he has a right to do that.

Mr. GLASGOW: He has his own copy.

By Mr. PLATT:

Q. Is the document that I now show you, the document which belongs to me, the same as the one you have been referring to?

The COURT: I think they are entitled to have this documentary evidence identified. The rule is when you call an expert to testify without books that you must have your documents here and they have a right to have those documents identified. What is all the trouble about?

Mr. GLASGOW: The only trouble was that I had given a copy to Mr. Platt and I wanted him to use his and let us keep ours.

By Mr. PLATT:

Q. This copy is the same, is it?

A. Yes, sir; as far as I can see.

Q. This is a carbon copy of the same document which you furnished to us at the time?

A. Yes.

Mr. PLATT: I will have that marked instead of the other.

(Document marked Defendant's Exhibit A for identification.)

124 By Mr. PLATT:

Q. Now take the smaller sheets of the document which you have been looking at, which you say are those which relate to the discrimination case?

A. Yes.

Q. These that I hand you now are a duplicate of those same sheets which were furnished by you to the defendant at the same time?

A. Yes.

(Sheets marked Defendant's Exhibit B for identification.)

By Mr. PLATT:

Q. When you say these sheets were approved by the Lehigh Valley, you mean nothing more, do you, than they were turned over to the Lehigh Valley Accounting Department for the purpose of checking up the figures in them?

A. That is all.

Q. Look at the column in the large sheets headed "Time." You see there is, under the head of "Years and Days" a date and a number of days. What does that mean? Take for instance the item "8-8-10-23." What does that mean?

A. It means the 8th day of the 8th month. Let me see that.

Q. Ten years and 23 days refers to the elapsed time on which the interest is calculated?

A. Yes.

Q. What does the eighth day of the eighth month mean?

A. I think that means the date that the draft actually was presented. The date of your bill is August 6th.

Q. August 6th was the date of the shipment, was it not?

A. No, excuse me. That was the date of your invoice.

125 That August 6th bill covered shipments of the previous week. That was the date of your draft. Now the draft was presented to us on August 8th and we, therefore, figured the interest from the date on which we paid your bill.

Q. In other words, the 8-8 is the date you paid our draft for the freight?

A. I think so.

Q. The Lehigh Valley's draft on you?

A. Yes.

Q. What you have said in regard to this first case would apply to all of the subsequent items?

A. Yes, I think so. That is as I recollect it.

Redirect examination.

By Mr. GLASGOW:

Q. These two documents which Mr. Platt has had identified, as I understood you, were submitted to the Lehigh Valley Railroad. What department of the road?

A. To the Auditing Department.

Q. Do you recall to whom it was submitted? The name of the man?

A. Mr. Miller, and Mr. Grier had them, too, at one time.

Q. Was then the statement gone over as to the amount of shipments, the dates of the payments of freight, the calculations of interest, the difference between the amount of freight paid and the amount under the finding of the Commission and the balance shown on the total of the statement?

A. Yes.

Q. That was submitted to him and he went over it; what did he say about the statement?

A. He said there were several—on the original statement there were corrections made, in both statements. They made a statement and we made a statement, or rather they made a statement and corrected our statement, and they made some mistakes and 126 we went back again and we finally got together on this statement.

Q. What do you mean by getting together?

A. I mean by that we got the exactly correct figures and they show right here on this statement.

Q. What did they say about it?

A. They say these figures are absolutely correct, the same as we do.

By Mr. PLATT:

Q. Those are the figures that, after they were checked back and forth, were found by you to be the statement of the amount on the basis that you had presented it? In other words, they simply checked over your figures and corrected details of your figures?

A. Yes, and we corrected the details of some of theirs.

Q. But all the subsequent work between Mr. Miller and yourself or your assistant was as to details of correction of figures?

A. Yes.

By Mr. GLASGOW:

Q. As I understand you, that statement was agreed upon between

you and the representative of the Lehigh Valley Railroad Company as to the amount of coal shipped by you, the dates of the payments of freight by you, the amount of the payments of freight, the interest upon the excess payment over and above the amount of the rate found by the Commission?

A. Absolutely.

Q. And they found that to be correct?

A. Absolutely.

Q. And agreed to it?

A. Yes.

Mr. GLASGOW: I want this joint resolution, of June 30, 1906, of Congress, to appear on the record so that it will be convenient for your Honor to consider it: "The Act entitled 'An Act to amend an Act entitled "An Act to Regulate Commerce," approved February 4, 1887, and all its Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission' shall take effect and be in force sixty days after its approval by the President of the United States."

Mr. PLATT: Add the words "approved June 30, 1906."

Mr. GLASGOW: I agree it may be stated "Approved June 30, 1906." The statement above made may be corrected in accordance with the published statutes, if there is anything wrongly stated in it.

Mr. PLATT: I think it will add to the convenience if I give you the two references to the statutes at large, your Honor.

Mr. GLASGOW: Do not let us argue this case.

Mr. PLATT: If you are going to put that much in, I should think it would be proper to put the references in, because these printed books are quite incomplete that have been gotten out by various people containing statutes. The references are 34th Statutes at Large, p. 595, and 34th Statute at Large, p. 838.

The COURT: What is there about the approval of that joint resolution? As I understand, the Hepburn Act was passed on the 29th of June?

Mr. GLASGOW: Yes.

The COURT: After they passed it and it was signed by the President, then they passed this joint resolution the next day?

Mr. GLASGOW: Postponing the effective date of it.

The COURT: And that was signed by the President?

128 Mr. GLASGOW: Yes, sir.

Mr. PLATT: It had the same effect, as I understand it, although it was called a joint resolution, as an Act of Congress. Nothing could be done to amend or change the Act of Congress of the 29th, unless it was acted on by both Houses of Congress and approved by the President.

By Mr. GLASGOW:

Q. Mr. Meeker, can you state to the jury when the arrangement or agreement by which the average adjustment of rates on the 65 per cent. basis instead of 60 was made effective by the Lehigh Valley Railroad Company?

Mr. PLATT: I object. He has not testified there was any such

agreement. Furthermore, he has not shown he is competent in any way to testify.

Mr. GLASGOW: I am going to find out how he does know, if he does know.

The COURT: Find out if he knows.

By Mr. GLASGOW:

Q. Do you know?

A. Yes.

Q. How do you know?

A. I had a notice from the coal freight agent of the Lehigh Valley Railroad Company.

Q. Did you ever hear the Auditor of the Company say anything about it, when it became effective?

(Not answered.)

Q. What date did that become effective?

Objected to as a conclusion. Objection overruled. Exception noted for defendant by direction of the Court.

A. August 1, 1901.

Q. For what period of time did it then apply, the 65 per cent. basis?

129 Same objection. Objection overruled. Exception noted for defendant by direction of the Court.

A. From November 1, 1900, to August 1, 1901.

Plaintiff Rests.

Defendant's Evidence.

Mr. PLATT: I have no desire to make an opening statement. I offer in evidence the two documents that were marked Defendant's Exhibit A for identification and Defendant's Exhibit B for identification. Let them be marked Defendant's Exhibit A and Defendant's Exhibit B.

(Papers marked accordingly and admitted in evidence.)

GEORGE W. FIELD, having been duly sworn, was examined as follows:

By Mr. PLATT:

Q. Where do you reside?

A. New York City.

Q. What is your business?

A. I am a law clerk.

Q. Where?

A. At New York City, 2 Rector Street.

Q. In the office of O'Brien, Boardman & Platt, counsel in this case?

A. Yes, sir.

Q. Have you assisted in the preparation and upon the hearings of this case before the Interstate Commerce Commission and in this court?

130 A. Yes, sir.

Q. Have you made certain calculations from Exhibits A and B, which have just been offered in evidence, dividing up those shipments as between the different dates to which it has been claimed that the different statutes of limitation apply?

A. I made the calculations on Exhibit B, but those on Exhibit A were made under my instructions.

Q. Take the calculations that you made under Exhibit B and state, if you please, what part of those under Exhibit B were on shipments prior to July 17, 1901.

A. Of the total amount appearing as the basis of the claim on Exhibit B, for the period between Nov. 1, 1900, and August 1, 1901, that total being \$11,009.33, \$795.64 of that amount is based upon shipments which were made subsequent to July 17, 1901, the balance representing the amount based upon shipments prior to July 17, 1901.

Q. Will you please state on the record the amount on shipments prior to July 17, 1901?

A. \$10,213.69.

Q. Have you figured the interest on the part prior to July 17, 1901?

A. Of the interest item appearing on Exhibit B, being the interest on \$11,009.33 to January 1, 1912, a total of \$6,886.33, of that amount \$497.67 constitutes the interest on the smaller amount that I just gave before, namely, \$795.64. Therefore, the interest applicable against the \$10,213.69 is the difference between \$6,886.33 and \$497.67, or \$6,388.66.

Q. Have you made certain divisions of Exhibit A, being the large sheet?

A. Yes, sir.

Q. Are they contained in the paper that I now hand you?

A. Yes, sir.

Q. And those are correct calculations?

131 A. Yes, sir.

Q. This is a statement, as I understand it, made up to show the amounts of principal and interest, with reference to the various claims that have been made here to-day under the different statutes of limitation?

A. Yes, sir.

By Mr. GLASGOW:

Q. How did you get, as to that Exhibit B, a division as of July 17th?

A. I said I had that made up; Mr. Merrill, who is here, made the division from the records.

Q. I thought you were testifying as to this Exhibit B.

A. I distinguished. I said that as to Exhibit A the figures I made up myself. As to Exhibit B, I had them made up. Mr. Merrill made them up for me.

Q. Where are the figures he made up?

A. Mr. Merrill is here. They are on the books of the company here at the office in Philadelphia. I was careful to state that. I thought you heard me.

Q. You did not see the books of the company at all?

A. Oh, no. I said not.

By Mr. PLATT:

Q. That is, as to the \$11,009 item, you had that made up by Mr. Merrill?

A. Yes, sir.

Q. But the other, the big sheet, you made that calculation up which appears on this paper now in Mr. Glasgow's hands? You made that up yourself?

A. Yes, sir.

By Mr. GLASGOW:

Q. Then, as I understand it, you made no calculation from the books as to this Exhibit B at all?

A. Referring to the \$11,000?

Q. Yes.

A. Oh, no. I so stated, too.

132 Mr. GLASGOW: Of course, I cannot follow these calculations now. I have no objection to the paper going in. Of course, if we discover any error in it, I ask permission to call attention to it hereafter.

Mr. PLATT: There is no trouble about that. Mr. Meeker can check it all up, and if there is any error in it, Mr. Glasgow and I will have no trouble in fixing it up. It is a mere calculation from this document.

I offer in evidence the paper which Mr. Field has just referred to as having been made up by himself.

The paper offered, marked Defendant's Exhibit C, is as follows:

"Excessive Charge Claim."

Limitation.	Principal.	Interest to Sept. 1, 1911.	Interest to Aug. 1, 1912.	Total.
Sept. 3, 1907 (5-yr. penalty. U. S. Statute) :				
Claim	58,236.45	27,750.64	3,203.00	89,190.09
Barred ...	58,236.45	27,750.64	3,203.00	89,190.09
Balance....	0	0	0	0
Sept. 3, 1906 (6-yr. Penn. Statute) :				
Claim	58,236.45	27,750.64	3,203.00	89,190.09
Barred ...	54,383.15	26,741.53	2,991.07
Balance....	3,853.30	1,009.11	211.93	5,074.34
June 29, 1906 (Passage of Act) :				
Claim	58,236.45	27,750.64	3,203.00	89,190.09
Barred ...	53,554.78	26,488.39	2,945.51
Balance....	4,681.67	1,272.25	257.49	6,211.41
133				
July 17, 1905. 2 years before filing:				
Claim	58,236.45	27,750.64	3,203.00	89,190.09
Barred	46,766.90	24,171.61	2,572.18
Balance....	11,469.55	3,579.03	630.82	15,679.40
Aug. 28, 1904 (2 years before effective date) :				
Claim	58,236.45	27,750.64	3,203.00	89,190.09
Barred	42,738.61	22,594.05	2,350.62
Balance....	15,497.84	5,156.59	852.38	21,506.81
June 29, 1904 (2 years before passage) :				
Claim	58,236.45	27,750.64	3,203.00	89,190.09
Barred	42,401.53	22,449.86	2,332.08
Balance....	15,834.92	5,300.78	870.92	22,006.62
July 17, 1902 (5 years before filing U. S. Penalty Statute) :				
Claim	58,236.45	27,750.64	3,203.00	89,190.09
Barred	17,790.24	10,305.72	978.46
Balance....	40,446.21	17,444.92	2,224.54	60,115.67
Aug. 31, 1901 (U. S. 5-yr. Statute vs. Discrimination Claim only) :				
Claim	58,236.45	27,750.64	3,203.00	89,190.09
Barred	0	0	0	0
Balance....	58,236.45	27,750.64	3,203.00	89,190.09

134 The COURT: Suppose Mr. Field just gives his conclusions from that paper, to give us an idea.

The WITNESS: I can give you five results.

Mr. PLATT: I suppose what the Court desires is to have the paper explained, so it is perfectly plain on the record.

The COURT: Yes; to show what figuration he is making, what statutes of limitation you have raised here. There are a number of statutes.

The WITNESS: The first item on this sheet refers to the five-year limitation under the United States statute; that is to say, five years prior to the date of bringing the suit, which would bring it back to September 3, 1907. If all claims prior to that date are barred, the recovery would be zero, because that bars all of the causes of action in suit. Taking the next statute, six years under the Pennsylvania statute, going back to September 3, 1906, the Pennsylvania six-year statute, if applied, would bar all amounts sued for with the exception of \$5,074.34. That includes interest.

By Mr. GLASGOW:

Q. Will you state that again, please?

A. If the Pennsylvania statute, six years from the date the suit was filed—

Q. What suit?

A. This suit was filed.

By the COURT:

Q. In this Court?

A. In this Court; yes, sir—the result would be that it would cut all but \$5,074.34. These totals that I am giving you, your Honor, include the interest up to August 1, 1912, the petition having brought the interest up to that date. The third item refers to the assumption that all claims prior to June 29, 1906, which is the date of 135 the Hepburn act, are barred. If that were the case, then everything would be barred except \$6,211.41, which includes interest up to August 1, 1912. The next item refers to the assumption that claims two years prior to the filing of the complaint before the Commission are barred; in other words, that all claims are barred prior to July 17, 1905, in which case the recovery would be limited to \$15,679.40, plus whatever interest would accrue after August 1, 1912. The next item refers to a limitation applying two years before the effective date of the Hepburn act, bringing the limitation back to August 28, 1904, in which case the recovery would be limited to \$21,506.81, with whatever interest accrues after August 1, 1912. The next item refers to a limitation two years before the passage of the act—that is to say, as of June 29, 1904, which would limit the recovery to \$22,006.62, with whatever interest accrued after August 1, 1912. The next item refers to five years before the complaint was filed before the Commission, bringing it back to July 17, 1902, which would bar everything excepting \$60,115.67, plus interest from August 1, 1912. The last item assumes that the United States five-year statute bars out the discrimination claim only; in other words, that the \$11,000 discrimination item is barred by the

five-year statute, which would leave in suit the amount of the reparation cause; that is, the amounts referred to between August 1, 1901, and July 17, 1907, or \$89,190.09.

Cross-examination.

By Mr. GLASGOW:

Q. Suppose you go a little bit further. If the statute of limitations does not apply to the \$11,000 claim referred to—that is, between November 1, 1900, and August 1, 1901—and if the limitation on the filing of the petition is one year from August 28, 1906, and the petition was filed on July 17, 1907, then the amount of the claim which would be recoverable, as far as the statutes of limitations are concerned, is the amount stated in the plaintiff's declaration, is it not?

A. I am afraid I do not follow you.

Q. I just want you to follow your own statement a little bit further. If the \$11,009 claim between November 1, 1900, and August 1, 1901, is not barred by the statute of limitations, and if the plaintiff's claim between August 1, 1901, and July 17, 1907, is not barred by the statute of limitations to which you have referred, then the amount of the plaintiff's claim is correctly stated in the statement of claim, is it not?

A. I can state that a comparison with the petition, a careful comparison with the Exhibits A and B, shows that you have correctly transcribed the items into the petition.

Q. And, so far as the statutes of limitations are concerned, if they are not applied to either of the claims that you have referred to, the petition correctly states the plaintiff's claim?

A. I do not want to answer a question like that.

MR. PLATT: I object to it. It is asking the witness to argue the case. The witness is put on for the purpose of making certain calculations.

MR. GLASGOW: He has stated his side of the claim in case the statute of limitations is applied. Now I just want him to state the other side of it.

By Mr. GLASGOW:

Q. In case the statute is not applied, so far as the statute of limitations is concerned, the plaintiff's claim is stated correctly, is it not?

MR. PLATT: I object to that, on the ground that it is asking the witness for a conclusion, and it is not cross-examination.

The COURT: In his statement as to what effect the statute would have upon your claim in the various cases insisted upon by the defendant, he does not admit that your statement of claim is right. He is simply working out what he says would be the effect of the statute on what you claim. You now have a right to ask him, however, whether or not you have stated your claim correctly, if the statute does not bar you.

MR. GLASGOW: That is what I have asked him.

By Mr. GLASGOW:

Q. Have I stated correctly in this petition the orders of the Commission, if it is not barred by the statute of limitations?

Mr. PLATT: I object. He has a right to ask him to state the amounts stated in his petition, but when he asks the broad question as to whether he has stated the orders and rulings of the Commissioners correctly, that is asking him to interpret a document that is before the Court.

The COURT: No; not if he has examined into it or has seen it is stated correctly. He is a competent man, a competent accountant, and if he sees the figures are stated correctly, he can say so.

Objection overruled, and exception noted for defendant by direction of the Court.

A. The figures in the order, so far as they are applicable, the figures in your petition and the figures in Exhibits A and B, in so far as they purport to correspond, are correctly transcribed one from the other. They are all correct.

By Mr. GLASGOW:

Q. That is not the question I asked you. I asked you if this petition does not correctly state the figures which the Commission has in its order as to reparation, if the plaintiff's claim is not barred by any statute of limitations?

138 A. They correctly state the figures, whether it is barred or not. It is simply a question of figures.

Defendant Rests.

Testimony Closed.

The Court requested that Exhibits 1, 2 and 3 be read to the jury. Mr. Glasgow read to the jury what he stated to be material portions of said exhibits.

During argument on defendant's points for charge, the following statements were made:

Mr. GLASGOW: The important thing in this report, in the first report, was that the Commission, after a year and a half of consideration, or two years' consideration, of this case, found that the rates were unreasonable, and then they made a supplemental order, after another hearing——

The COURT: They had it before them from 1907 to 1911?

Mr. GLASGOW: Exactly; they had it for four years, and they took all kinds of evidence on it.

Mr. PLATT: There was no evidence taken covering this period. (August 1, 1901, to July 17, 1907.)

Mr. GLASGOW: Yes, there was, Mr. Platt. I had evidence tending to prove the cost of transportation in 1902, 1903, 1904, 1905, all the way along up, and you objected to it on the ground that the Commission could not order rates for the future on evidence of what the cost was in the past.

Mr. PLATT: I would like to take exception to those statements being made before the jury.

Mr. GLASGOW: You should not draw me into it. I will withdraw it, if you do not want it. That is the situation. Here the

139 Commission were considering a concrete case covering unreasonable rates from that period, August 1, 1901, and, after considering it, they found that the rates were unreasonable.

The COURT: August 1, 1901, down to when?

Mr. GLASGOW: 1907, July 17th. Then they find that the rates are unreasonable, in the first report, and then they recite that we were entitled, over that whole period, to a deduction from the dollar fifty-five cent rate, because they say that "we found to have been unreasonable." Now it is perfectly idle, it seems to me, to argue that the Commission has never found that the rate during that whole period was unreasonable, and that is a finding of fact upon which this jury is to consider, as a prima facie case, the claim of the plaintiff here, and the findings as to the amount of shipments, of the difference between the rates prescribed or found reasonable, and the rates charged, give the jury also the prima facie case as to the amount to which the complainant is entitled. Now that seems to be the situation, if your Honor please.

Mr. PLATT: I do not wish to enter into a dispute with Mr. Glasgow as to what took place before the Commission, because it has no place before this Court at all. We simply have before the Court the record in this case, and I desire to take exception, and have it noted on the record, as to Mr. Glasgow making statements as to what occurred before the Commission.

Exception noted as requested by direction of the Court.

(Adjourned until Tuesday, November 12, 1912, at 10 A. M.)

140

Statement.

Lehigh Valley Railroad Company.

	Tons.	Paid.	Amount paid.	65 % basis.	Amount.
Nov., 1900.					
Prepared.	2,165.11	\$1.7223	\$3,729.73	1.4714	\$3,186.39
Pea	936.03	1.3204	1,236.09	1.2004	1,123.75
Buckw't..	1,027.03	1.2290	1,262.37	1.0844	1,113.84
Rice	111.09	1.10	122.60	1.13	125.93
Rice	352.03	1.00	352.15	1.13	397.93
Dec., 1900.					
Prepared.	2,691.08	1.7240	4,639.97	1.4723	3,962.55
Pea	968.05	1.3705	1,326.99	1.2459	1,206.34
Buckw't..	1,119.19	1.2474	1,397.03	1.1006	1,232.62
Rice	488.14	1.00	488.70	1.13	552.23
Jan'y, 1901.					
Prepared.	5,185.04	1.55	8,037.06	1.48	7,674.10
Pea	1,551.01	1.40	2,171.47	1.2982	2,013.57
Buckw't..	1,438.08	1.25	1,798.00	1.1346	1,632.01
Rice	1,412.18	1.25	1,766.13	1.10	1,554.19

	Tons.	Paid.	Amount paid.	65% basis.	Amount.
Feb'y, 1901.					
Prepared.	10,386.17	1.55	16,099.62	1.4684	15,252.03
Pea	2,596.10	1.40	3,635.10	1.2890	3,346.88
Buckw't..	2,504.00	1.25	3,130.00	1.1287	2,826.20
Rice	1,132.16	1.25	1,416.00	1.10	1,246.08
March, 1901.					
Prepared.	14,165.04	1.55	21,956.06	1.4492	20,528.21
Pea	2,712.11	1.40	3,797.57	1.3104	3,554.53
Buckw't..	1,433.12	1.25	1,792.00	1.1708	1,678.46
Rice	1,127.03	1.25	1,408.94	1.13	1,273.68
April, 1901.					
Prepared..	7,206.08	1.55	11,169.92	1.3552	9,766.11
Pea	1,902.18	1.40	2,664.06	1.2813	2,438.19
Buckw't..	1,303.06	1.25	1,629.13	1.1265	1,468.17
Rice	103.06	1.25	129.13	1.0300	106.91
May, 1901.					
Prepared..	3,847.05	1.55	5,963.24	1.3803	5,310.36
Pea	2,354.14	1.40	3,296.58	1.2537	2,952.09
Buckw't..	1,344.09	1.25	1,680.56	1.1281	1,516.67
Rice	0.00	1.25	0.00	0.00
June, 1901.					
Prepared..	5,094.17	1.55	7,897.02	1.4096	7,181.70
Pea	1,477.02	1.40	2,067.94	1.2482	1,843.72
Buckw't..	670.19	1.25	838.69	1.1203	751.67
Rice	146.00	1.25	182.50	1.14	166.44
Brought					
Forw'd..	\$80,958.03		\$119,082.35		\$108,983.64
141 & 142					
Brought					
for'd...	\$80,958.03		\$119,082.35		\$108,983.64
July, 1901.					
Prepared..	4,518.01	1.55	7,002.98	1.4365	6,490.18
Pea	2,193.12	1.40	3,071.04	1.2551	2,753.19
Buckw't..	610.17	1.25	763.56	1.1345	693.01
Rice	55.08	1.25	69.25	1.08	59.83
	<u>\$88,336.01</u>		<u>\$129,989.18</u>		<u>\$118,979.85</u>

Amount Paid..... \$129,989.18

65% Basis..... 118,979.85

\$11,009.33

Interest on \$11,009.33 from August 1, 1901, to Jan'y 1,
1912, 10 years, 153 days..... \$6,886.33

Interest on \$11,009.33 per day is \$1.84.

(Here follow pasters, marked pages 143-192.)

To Sept. 1, 1911.

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time Interest		
									Yrs. Days		
Aug. 6, '01. 32	242.18			376.49		340.06					
" " "		88.10		123.90		115.05					
" " "			18.00	22.50	522.89	20.70	475.81	47.08	8/8	10	23
Aug. 13, '01. 33	1,625.01			2,518.83		2,275.07					
" " "		619.03		866.81		804.90					
" " "			170.12	213.26	3,598.90	196.19	3,276.16	322.74	8/15	10	16
Aug. 20, '01. 34	1,470.01			2,278.58		2,058.07					
" " "		416.00		582.40		540.80					
" " "			158.18	198.63	3,059.61	182.73	2,781.60	278.01	8/22	10	9
Aug. 27, '01. 35	1,682.16			2,608.34		2,355.92					
" " "		149.04		208.88		193.96					
" " "			230.08	288.00	3,105.22	264.96	2,814.84	290.38	8/29	10	2
Sept. 3, '01. 36	1,972.04			3,056.91		2,761.08					
" " "		212.16		297.92		276.64					
" " "			225.14	282.13	3,636.96	259.55	3,297.27	339.69	9/5	9	360
Sept. 10, '01. 37	1,161.17			1,800.87		1,626.59					
" " "		316.04		442.68		411.06					
" " "			25.00	31.25	2,274.80	28.75	2,066.40	208.40	9/12	9	353
Sept. 17, '01. 38	2,416.12			3,745.73		3,383.24					
" " "		733.02		1,026.34		953.03					
" " "			464.07	580.44	5,352.51	534.00	4,870.27	482.24	9/20	9	345
Sept. 23, '01. 39	1,956.07			3,032.35		2,738.89					
" " "		796.19		1,115.73		1,036.03					
" " "			424.16	531.01	4,679.09	488.52	4,263.44	415.65	9/26	9	339
Oct. 1, '01. 40	2,917.16			4,522.59		4,084.92					
" " "		949.04		1,328.88		1,233.96					
" " "			636.13	795.82	6,647.29	732.15	6,051.03	596.26	10/3	9	332
Oct. 2, '01. 41	1,114.05			1,727.09		1,559.95					
" " "		271.09		380.03		352.88					
" " "			146.19	183.69	2,290.81	168.99	2,081.82	208.99	10/10	9	325
Oct. 2, '01. 42	606.02			939.46		848.54					
" " "		455.18		638.26		592.67					
" " "			141.12	177.00	1,754.72	162.84	1,604.05	150.67	10/10	9	325
Oct. 13, '01. 43	1,802.07			2,793.65		2,523.29					
" " "		392.11		549.57		510.31					
" " "			427.01	533.82	3,877.04	491.10	3,524.70	352.34	10/17	9	318
Oct. 22, '01. 44	1,659.03			2,571.68		2,322.81					
" " "		616.17		863.59		801.90					
" " "			380.02	475.13	3,910.40	437.12	3,561.83	348.57	10/24	9	311
Oct. 29, '01. 45	2,722.08			4,219.72		3,811.36					
" " "		777.16		1,088.72		1,011.14					
" " "			828.09	1,035.57	6,344.21	952.72	5,775.22	568.99	10/31	9	304
Nov. 2, '01. 46	1,509.01			2,339.03		2,112.67					
" " "		492.07		689.29		640.05					
" " "			514.09	643.06	3,671.38	591.62	3,344.34	327.04	11/7	9	297
Forward	24,858.18	7,288.00	4,793.00		54,725.83		49,788.78	4,937.05			2,941.88



Microcard Editions

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CARD 2

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	24,858.18	7,288.00	4,793.00		54,725.83		49,788.78	4,937.05		2,941.88
Nov. 12th, 1901	2,666.04			4,132.62		3,732.68				
B47		1,051.17		1,472.59		1,367.40				
			942.10	1,178.13	6,783.34	1,083.87	6,183.95	599.39	11/14 9 290	352.63
Nov. 19th, 1901	4,777.04			7,404.66		6,688.08				
48		1,203.03		1,684.41		1,564.10				
			1,501.00	1,876.26	10,965.33	1,726.15	9,978.33	987.00	11/21 9 283	579.53
Nov. 26th, 1901	4,844.19			7,509.68		6,782.93				
49		951.05		1,331.75		1,236.62				
			1,225.14	1,532.13	10,373.56	1,409.55	9,429.10	944.46	11/29 9 275	553.28
Dec. 3rd, 1901	2,792.07			4,328.15		3,909.29				
50		376.02		526.54		488.93				
			1,071.08	1,339.26	6,193.95	1,232.11	5,630.33	563.62	12/5 9 269	329.63
Dec. 3rd, 1901	179.13			278.46		251.51				
51		148.17		208.39		193.50				
			428.08	535.50	1,022.35	492.66	937.67	84.68	12/5 9 260	49.48
Dec. 10th, 1901	1,199.03			1,858.69		1,678.81				
52		258.12		362.04		336.18				
			555.07	694.19	2,914.92	638.65	2,653.64	261.28	12/12 9 262	152.48
Dec. 17th, 1901	2,320.17			3,597.33		3,249.19				
53		876.13		1,227.31		1,139.64				
			957.17	1,197.31	6,021.95	1,101.52	5,490.35	531.60	12/19 9 255	309.67
Dec. 24th, 1901	1,681.19			2,607.03		2,354.73				
54		432.15		605.85		562.57				
			645.07	806.69	4,019.57	742.15	3,659.45	360.12	12/27 9 247	209.28
Dec. 31st, 1901	793.07			1,229.70		1,110.69				
55		173.15		243.25		225.87				
			342.15	428.44	1,901.39	394.16	1,730.72	170.67	1/4 9 239	98.97
Dec. 31st, 1901			131.14	164.63	164.63	151.46	151.46	13.17	1/4 9 239	7.63
56										
Jan. 2nd, 1902	341.17			529.87		478.59				
57		455.07		637.49		591.95				
			468.05	585.31	1,752.67	538.49	1,609.03	143.64	1/9 9 234	83.15
Jan. 7th, 1902	67.08			104.48		94.36				
C1		50.12		70.84		65.78				
			43.03	53.94	229.26	49.62	209.76	19.50	1/16 9 227	11.29
Jan. 14th, 1902	1,094.01			1,695.79		1,531.67				
C1		445.10		623.70		579.15				
			506.05	632.82	2,952.31	582.19	2,693.01	259.30	1/16 9 227	149.82
Jan. 21st, 1902	928.01			1,438.48		1,299.27				
C3		747.13		1,046.71		971.94				
			1,007.09	1,259.32	3,744.51	1,158.57	3,429.78	314.73	1/23 9 220	181.50
Jan. 28th, 1902	1,263.00			1,957.65		1,768.20				
C4		618.19		866.53		804.63				
			427.13	534.57	3,358.75	491.80	3,064.63	294.12	1/30 9 213	169.26
Forward	49,808.18	15,079.00	15,047.15		117,124.32		106,639.99	10,484.33		6,179.48

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	To Sept. 1911		
									Time Interest		
									Yrs. Days.		
Forward	49,808.18	15,079.00	15,047.15		117,124.32		106,639.99	10,484.33			6,179.48
Feb. 2nd, 1902	1,732.17			2,685.92		2,425.99					
C5		566.08		792.96		736.32					
			819.11	1,024.45	4,503.33	942.48	4,104.79	398.54	2/6	9 206	228.91
Feb. 11th, 1902	858.15			1,331.07		1,202.25					
6		404.01		565.67		525.27					
			381.17	477.32	2,374.06	439.12	2,160.64	207.42	2/13	9 199	188.87
Feb. 18th, 1902	1,788.16			2,757.15		2,490.32					
7		744.16		1,042.72		968.24					
			756.16	946.01	4,745.88	870.32	4,328.88	417.00	2/20	9 192	238.52
Feb. 25th, 1902	1,967.18			3,050.24		2,755.06					
8		328.02		459.34		426.53					
			1,024.06	1,280.38	4,789.96	1,177.95	4,359.54	430.42	2/27	9 185	245.68
Mar. 2nd, 1902	2,644.13			4,099.21		3,702.51					
9		114.05		159.95		148.53					
			17.04	21.50	4,280.66	19.78	3,870.82	409.84	3/6	9 178	233.47
Mar. 11th, 1902	905.07			1,403.29		1,267.49					
10		184.10		258.30	1,661.59	239.85	1,507.34	154.25	3/13	9 171	87.68
Mar. 18th, 1902	22.05			34.49		31.15					
11			157.15	197.19	231.68	181.41	212.56	19.12	3/20	9 164	10.84
Mar. 25th, 1902	877.06			1,359.81		1,228.22					
12		49.09		69.23		64.28					
			81.02	101.38	1,530.42	93.28	1,385.78	144.64	3/27	9 157	81.90
Apr. 1st, 1902	3,449.17			5,347.27		4,829.79					
13		830.10		1,162.70	6,509.97	1,079.65	5,909.44	600.53	4/3	9 150	339.30
Apr. 2nd, 1902	3,202.15			4,964.27		4,483.85					
13½		691.19		968.73	5,933.00	899.53	5,383.38	549.62	4/3	9 150	310.54
Apr. 8th, 1902	3,593.08			5,569.77		5,030.76					
14		618.07		865.69		803.85					
			181.02	226.38	6,661.84	208.27	6,042.88	618.96	4/10	9 143	348.99
Apr. 15th, 1902	4,663.12			7,228.58		6,529.04					
15		937.05		1,312.15		1,218.42					
			1,131.02	1,413.88	9,954.61	1,300.76	9,048.22	906.39	4/17	9 136	509.99
Apr. 22nd, 1902	5,404.01			8,376.28		7,565.67					
16		907.14		1,270.78		1,180.01					
			903.00	1,128.75	10,775.81	1,038.45	9,784.13	991.68	4/24	9 129	556.83
Apr. 29th, 1902	2,753.05			4,267.54		3,854.55					
17		1,415.16		1,982.12		1,840.54					
			768.19	961.20	7,210.86	884.30	6,579.39	631.47	5/1	9 122	353.82
May 2nd, 1902	527.11			817.70		738.57					
18		754.08		1,056.16		980.72					
			653.09	816.81	2,690.67	751.47	2,470.76	219.91	5/8	9 115	122.96
May 6th, 1902		161.01		225.47		209.37					
18A			105.06	131.56	357.03	121.04	330.41	26.62	5/8	9 115	14.89
Forward	84,191.04	23,787.11	22,029.03		191,335.69		174,124.95	17,210.74			9,982.67

9/1/11

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	84,191.04	23,787.11	22,029.03		191,335.69		174,124.95	17,210.74		9,982.67
May 13th, 1902	1,868.02			2,895.55		2,615.34				
C20		753.00		1,054.20		978.90				
			952.00	1,190.00	5,139.75	1,094.80	4,689.04	450.71	5/15 9 108	251.50
May 20th, 1902	435.01			674.33		609.07				
C20A		169.17		237.79		220.80				
			197.15	247.19	1,159.31	227.41	1,057.28	102.03	5/22 9 101	56.80
June 24th, 1902	178.08				276.52		249.76	26.76	6/26 9 66	14.75
21										

Forward	86,672.15	24,710.08	23,178.18		197,911.37		180,121.03	17,790.24		10,305.72.
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9/1/11

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	86,672.15	24,710.08	23,178.18		197,911.27		180,121.03	17,790.24		10,305.72
Aug. 12th, 1902	234.10				363.47		328.30	35.17	8/14 9 17	19.09
1001										
Sept. 30th, 1902										
1003	18.05			28.29		25.55				
			17.18	22.38	50.67	20.58	46.13	4.54	10/2 8 333	2.43
Oct. 28th, 1902	459.18			712.85		643.86				
1007		71.19		100.73		93.53				
			85.02	106.38	919.96	97.86	835.25	84.71	10/30 8 305	44.98
Nov. 2d, 1902	2,082.06			3,227.57		2,915.22				
1008			169.15	212.19		195.21				
		69.06		97.02	3,536.78	90.09	3,200.52	336.26	11/6 8 298	178.09
Nov. 11th, 1902	3,662.06			5,676.57		5,127.22				
1009		173.19		243.53		226.13				
			40.13	50.81	5,970.91	46.75	5,400.10	570.81	11/13 8 291	301.67
Nov. 18th, 1902	4,801.08			7,442.18		6,721.96				
1010		508.07		711.69	8,153.87	660.85	7,382.81	771.06	11/20 8 284	406.59
Nov. 25th, 1902	5,816.09			9,015.50		8,143.03				
1011		1,045.18		1,464.26		1,359.67				
			467.02	583.88	11,063.64	537.17	10,039.87	1,023.77	11/28 8 276	538.51
Dec. 2nd, 1902	5,127.01			7,946.94		7,177.88				
1012		523.00		732.20		679.90				
			548.16	686.00	9,365.14	631.12	8,488.90	876.24	12/4 8 270	459.99
Dec. 9th, 1902	3,797.04			5,885.67		5,316.08				
1013		457.14		640.78	6,526.45	595.01	5,911.09	615.36	12/11 8 263	322.33
Dec. 16th, 1902	5,781.13			8,961.56		8,094.31				
1014		715.10		1,001.70		930.15				
			982.18	1,228.63	11,191.89	1,130.33	10,154.79	1,037.10	12/18 8 255	541.87
Dec. 23d, 1902	4,455.05			6,905.65		6,237.35				
1015		899.06		1,259.02		1,169.09				
			757.11	946.94	9,111.61	871.18	8,277.62	833.99	12/26 8 248	434.78
Dec. 30th, 1902	5,008.12			7,763.33		7,012.04				
1016		627.03		878.01		815.30				
			967.17	1,209.81	9,851.15	1,113.03	8,940.37	910.78	1/2 8 241	473.76

Forward	127,917.12	29,802.10	27,216.10		274,016.81		249,126.78	24,890.03		14,029.81
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	127,917.12	29,802.10	27,316.10		274,016.81		249,126.78	24,890.03		14,029.81
Jan. 3rd, 1903	4,358.08			6,755.52		6,101.76				
1		27.13		38.71		35.95				
			817.19	1,022.45	7,816.68	940.64	7,078.35	738.33	1/8 8 235	383.30
Jan. 13th, 1903	6,045.09			9,370.46		8,463.62				
2		307.17		430.99		400.20				
			1,054.19	1,318.69	11,120.14	1,213.19	10,077.02	1,043.12	1/15 8 228	540.32
Jan. 20th, 1903	4,602.06			7,133.57		6,443.22				
3		411.03		575.61		534.49				
			301.14	377.13	8,086.31	346.96	7,324.67	761.64	1/22 8 221	393.65
Jan. 27th, 1903	2,817.06			4,366.82		3,944.22				
4		886.01		1,240.47		1,151.87				
			255.04	319.00	5,926.29	293.48	5,389.57	536.72	1/29 8 214	276.77
Feb. 3rd, 1903	2,538.10			3,934.68		3,553.90				
5		1,357.03		1,900.01		1,764.30				
			996.16	1,246.01	7,080.70	1,146.32	6,464.52	616.18	2/5 8 207	317.02
Feb. 3rd, 1903	2,298.07			3,562.44		3,217.69				
6		1,524.00		2,133.60		1,981.20				
			1,309.13	1,637.06	7,333.10	1,506.10	6,704.99	628.11	2/13 8 199	322.32
Feb. 17th, 1903	2,886.19			4,474.77		4,041.73				
7		882.19		1,236.13		1,147.84				
			836.15	1,045.94	6,756.84	962.26	6,151.83	605.01	2/19 8 193	309.86
Feb. 24th, 1903	233.08			361.77		326.76				
8		337.08		472.36		438.62				
			726.03	907.69	1,741.82	835.07	1,600.45	141.37	2/26 8 186	72.22
Mch. 3rd, 1903	1,487.13			2,305.86		2,082.71				
9		898.07		1,257.69		1,167.86				
			870.15	1,088.44	4,651.99	1,001.36	4,251.93	400.06	3/5 8 179	203.96
Mch. 10th, 1903	1,814.17			2,813.02		2,540.79				
10		229.03		320.81		297.90				
			1,335.13	1,669.57	4,803.40	1,536.00	4,374.69	428.71	3/12 8 172	218.08
Mch. 17th, 1903	1,140.08			1,767.62		1,596.56				
11		72.15		101.85		94.58				
			1,049.10	1,311.88	3,181.35	1,206.93	2,898.07	283.28	3/19 8 165	143.76
Mch. 24th, 1903	618.03			958.13		865.41				
12		217.03		304.01		282.30				
			832.10	1,040.63	2,302.77	957.38	2,105.09	197.68	3/26 8 158	100.10
Mch. 31st, 1903		145.15		204.05		189.48				
13			935.00	1,168.75	1,372.80	1,075.25	1,264.73	108.07	4/2 8 151	54.59
April 7th, 1903		475.15		666.05		618.48				
14			815.01	1,018.82	1,684.87	937.31	1,555.79	129.08	4/9 8 144	65.06
April 14th, 1903		662.00		926.80		860.60				
15			656.14	820.88	1,747.68	756.21	1,615.81	131.87	4/16 8 137	66.30
April 21st, 1903		480.09		672.63		624.59				
16			528.03	660.19	1,332.82	607.37	1,231.96	100.86	4/23 8 130	50.60
April 28th, 1903		396.17		555.59		515.91				
17			473.04	591.50	1,147.09	544.18	1,060.09	87.00	4/30 8 123	43.54
Forward	158,759.06	39,114.18	41,012.03		352,103.46		320,276.34	31,827.12		17,591.26

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
Forward	158,759.06	39,114.18	41,912.03		352,103.46		320,276.34	31,827.12	Yrs. Days. 17,591.26	
May 2nd, 1903		234.09		328.23		304.79				
18			1,112.12	1,390.75	1,718.98	1,279.49	1,584.28	134.70	5/7 8 116	67.27
May 12th, 1903		17.10		24.50		22.75				
19			870.07	1,087.94	1,112.44	1,000.90	1,023.65	88.79	5/14 8 109	44.24
May 19th, 1903		73.02		102.34		95.03				
20			798.16	998.50	1,100.84	918.62	1,013.65	87.19	5/21 8 102	43.33
May 26th, 1903			489.06		611.63	562.70	562.70	48.93	5/28 8 95	24.27
21										
June 2nd, 1903		25.02		35.14		32.63				
22			368.09	460.57	495.71	423.72	456.35	39.36	6/4 8 88	19.46
June 9th, 1903		241.13		338.31		314.14				
23			354.13	443.32	781.63	407.85	721.99	59.64	6/11 8 81	29.43
June 16th, 1903	694.14			1,076.79		972.58				
24		440.01		616.07		572.06				
June 23rd, 1903	1,002.05		791.00	988.75	2,681.61	909.65	2,454.29	227.32	6/18 8 74	111.91
25		233.08		1,553.49		1,403.15				
June 29th, 1903	87.14		913.15	1,142.19	3,022.44	1,050.81	2,757.38	265.06	6/25 8 67	130.18
26		42.18		135.94		122.78				
July 7th, 1903			924.00	1,155.00	1,351.00	1,062.60	1,241.15	109.85	7/2 8 60	53.82
28-27		434.18		608.86		565.37				
July 14th, 1903			451.09	564.32	1,173.18	519.17	1,084.54	88.64	7/9 8 53	43.34
29		687.01		961.87		893.17				
July 21st, 1903			1,081.07	1,351.69	2,313.56	1,243.55	2,136.72	176.84	7/16 8 46	86.24
30		880.10		1,232.70		1,144.65				
July 28th, 1903			1,242.11	1,553.19	2,785.89	1,428.93	2,573.58	212.31	7/23 8 39	103.28
31		425.08		595.56		553.02				
Aug. 2nd, 1903			770.09	963.06	1,558.62	886.02	1,439.04	119.58	7/30 8 32	58.04
32		970.00		1,358.00		1,261.00				
Aug. 11th, 1903			1,067.01	1,333.82	2,691.82	1,227.11	2,488.11	203.71	8/6 8 25	98.63
33		249.08		480.16		454.22				
Aug. 18th, 1903			230.18	288.63	777.79	265.54	719.76	58.03	8/13 8 18	28.01
34		866.10		1,213.10		1,126.45				
Aug. 25th, 1903			107.16	134.75	1,347.85	123.97	1,250.42	97.43	8/20 8 11	46.94
35		188.00		263.20		244.40				
Sept. 1st, 1903			306.10	383.13	646.33	352.48	596.88	49.45	8/27 8 4	23.77
36		359.15		503.65		467.68				
Sept. 2nd, 1903			211.03	263.94	767.59	242.82	710.50	57.09	9/3 7 362	27.42
37		475.17		666.19		618.61				
Sept. 15th, 1903			87.19	109.94	776.13	101.14	719.75	56.38	9/10 7 355	26.99
38	158.17			246.22		222.39				
		332.08		465.36		432.12				
			385.13	482.07	1,193.65	443.50	1,098.01	95.64	9/17 7 348	45.74
Forward	160,702.16	46,392.16	53,577.17		381,012.15		346,909.09	34,103.06	18,703.57	

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	160,702.16	46,392.16	53,577.17		381,012.15		346,909.09	34,103.06		18,705.57
Sept. 22nd, 1903	1,214.14			1,882.79		1,700.58				
39		589.06		825.02		766.09				
			928.08	1,160.50	3,868.31	1,067.66	3,534.33	333.98	9/24 7 341	159.25
Sept. 29th, 1903	1,112.04			1,723.91		1,557.08				
40		210.03		294.21		273.19				
			700.12	875.75	2,893.87	805.69	2,635.96	257.91	10/1 7 334	122.68
Oct. 6th, 1903	327.18			508.24		459.06				
41		93.17		131.39		122.00				
			462.00	577.51	1,217.14	531.30	1,112.36	104.78	10/8 7 327	49.72
Oct. 13th, 1903	327.08			507.47		458.36				
42		94.09		132.23		122.79				
			734.08	918.00	1,557.70	844.56	1,425.71	131.99	10/15 7 320	62.48
Oct. 20th, 1903	1,001.11			1,552.40		1,402.17				
43		228.08		319.76		296.92				
			912.13	1,140.82	3,012.98	1,049.55	2,748.64	264.34	10/22 7 313	124.79
Oct. 27th, 1903	1,160.13			1,799.01		1,624.91				
44		358.07		501.69		465.85				
			648.05	810.32	3,111.02	745.49	2,836.25	274.77	10/29 7 306	129.43
Nov. 3rd, 1903	127.19			198.32		179.13				
45		33.00		46.20		42.90				
			21.18	27.38	271.90	25.19	247.22	24.68	11/5 7 299	11.60
Nov. 10th, 1903										
46			185.11	231.94	231.94	213.38	213.38	18.56	11/12 7 292	8.68
Nov. 17th, 1903	546.16			847.54		765.52				
47		249.07		349.09		324.16				
			675.00	843.75	2,040.38	776.25	1,865.93	174.45	11/19 7 285	81.54
Nov. 24th, 1903	619.04			959.76		866.88				
48		147.11		206.57		191.82				
			439.00	548.76	1,715.09	504.85	1,563.55	151.54	11/27 7 277	70.67
Dec. 2nd, 1903	1,061.16			1,645.79		1,486.52				
49		41.15		58.45		54.28				
			1,002.07	1,252.94	2,957.18	1,152.70	2,693.50	263.68	12/7 7 267	122.50
Dec. 8th, 1903	437.14			678.44		612.78				
50			520.07	650.44	1,328.88	598.40	1,211.18	117.70	12/12 7 262	54.59
Dec. 16th, 1903	117.11			182.20		164.57				
51		76.01		106.47		98.87				
			790.11	998.19	1,276.86	909.13	1,172.57	104.29	12/21 7 253	48.19
Dec. 23rd, 1903	778.12			1,206.84		1,090.04				
52		320.00		448.00		416.00				
			733.09	916.82	2,571.66	843.47	2,349.51	222.15	12/28 7 246	102.40
Forward	169,536.16	48,835.00	62,332.06		409,067.06		372,519.18	36,547.88		19,852.09

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	169,536.16	48,835.00	62,332.06		409,067.06		372,519.18	36,547.88		19,852.09
Jany. 1st, 1904	754.19			1,170.18		1,056.93				
53		98.15		138.25		128.38				
Jany. 9th, 1904	401.05		1,005.07	1,256.69	2,565.12	1,156.15	2,341.46	223.66	1/6 7 237	102.78
54-1		84.12		621.94		561.75				
Jany. 16th, 1904	192.01		284.10	355.62	1,096.00	327.17	998.90	97.10	1/13 7 230	44.50
2				297.68		268.87				
Jany. 23rd, 1904	514.11		547.10	684.38	982.06	629.63	898.50	83.56	1/20 7 223	38.18
3		61.10		797.55		720.37				
Feby. 2nd, 1904	822.04		605.01	756.32	1,639.97	695.81	1,496.13	143.84	1/27 7 216	65.59
4		192.13		1,274.41		1,151.08				
Feby. 9th, 1904	187.06		1,064.10	1,330.63	2,874.75	1,224.17	2,625.69	249.06	2/8 7 204	113.07
5		25.15		290.32		262.22				
Feby. 16th, 1904	1,310.13		414.18	518.62	844.99	477.13	772.83	72.16	2/11 7 201	32.72
6		53.00		2,031.51		1,834.91				
Feby. 23rd, 1904	688.12		742.06	927.88	3,033.59	853.65	2,757.46	276.13	2/19 7 193	124.85
7		474.19		1,067.34		964.04				
Mch. 2d, 1904	101.00		699.19	874.94	2,607.21	804.94	2,386.41	220.80	2/25 7 187	99.62
8		283.04		156.56		141.40				
Mch. 9th, 1904	940.06		86.17	396.48	661.60	368.16	609.44	52.16	3/6 7 178	23.43
9		602.15		108.56		99.88				
Mch. 16th, 1904	1,302.01			1,457.46		1,316.42				
10			309.02	843.86	2,687.69	783.57	2,455.46	232.23	3/13 7 171	104.14
Mch. 23rd, 1904	2,372.13		331.03	386.38	2,432.12	355.47	2,203.69	228.43	3/20 7 164	102.17
11				2,018.18		1,822.87				
April 2nd, 1904	4,810.17			413.94	4,010.30	380.82	3,627.78	382.52	3/27 7 157	170.65
			266.03	3,677.61		3,321.71				
April 9th, 1904	281.03			332.69		306.07				
13		947.13		7,456.82		6,735.19				
April 16th, 1904	244.14		1,234.15	1,326.71	10,326.97	1,231.94	9,387.09	939.88	4/7 7 146	417.62
14		208.12		1,543.44		1,419.96				
April 23rd, 1904	1,350.01		468.08	435.78	1,313.32	393.61	1,203.45	109.87	4/12 7 141	48.73
15		396.14		292.04		271.18				
			1,158.08	585.50	2,382.67	538.66	2,190.45	192.22	4/20 7 133	84.98
				379.29		342.58				
				555.38		515.71				
				1,448.00		1,332.16				
				2,092.58		1,890.07				
				840.14		780.13				
			1,171.19	1,464.94	4,397.66	1,347.74	4,017.94	379.72	4/26 7 127	167.52
Forward	185,811.02	52,865.04	72,723.02		452,923.08		412,491.86	40,431.22		21,592.64

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	185,811.02	52,865.04	72,723.02		452,923.08		412,491.86	40,431.22		21,592.64
May 3d, 1904	266.03			412.54		372.61				
16		1,087.04		1,522.08		1,413.36				
May 10th, 1904	174.05		1,636.14	2,045.87	3,980.49	1,882.20	3,668.17	312.32	5/5 7 118	137.31
17		636.01		270.09		243.95				
May 17th, 1904	64.06		912.18	890.47	2,301.69	826.86				
18		716.02		1,141.13		1,049.83	2,120.64	181.05	5/14 7 109	79.33
May 24th, 1904				99.67		90.02				
19		859.00	1,103.17	1,002.54	2,482.03	930.93	2,290.38	191.65	5/19 7 104	83.81
June 2nd, 1904	80.19		1,236.16	1,379.82	2,748.60	1,269.43	2,539.02	209.58	5/27 7 96	91.38
20		1,079.09		1,202.60		1,116.70				
June 9th, 1904	539.17			1,546.00		1,422.32				
21		269.05	1,397.00	125.48	3,382.96	113.33	3,123.16	259.80	6/8 7 84	112.75
June 16th, 1904	1,376.01			1,511.23		1,403.28				
22		487.18	734.04	1,746.25	2,131.48	1,606.55	1,950.14	181.34	6/11 7 81	78.60
June 23d, 1904	372.00			836.77		755.79				
23		655.15		376.95		350.02				
			1,281.15	917.76	4,418.13	844.33	4,034.75	383.38	6/18 7 74	165.74
				2,132.88		1,926.47				
				683.06		634.27				
				1,602.19		1,474.01				
				576.60		520.80				
				918.05		852.48				
			1,298.04	1,622.75	3,117.40	1,492.93	2,866.21	251.19	6/25 7 67	108.30

Forward	188,684.13	58,655.18	82,324.10		477,485.86		435,064.33	42,401.53		22,449.86
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	188,684.13	58,655.18	82,324.10		477,485.86		435,084.33	42,401.53		22,449.86
July 2nd, 1904										
	322.18			500.50		452.06				
24		807.08		1,130.36		1,049.62				
			788.16	986.00	2,616.86	907.12	2,408.80	208.06	7/9 7 53	89.23
July 9th, 1904	106.14			165.39		149.38				
25		75.03		105.21		97.69				
			172.13	215.81	486.41	198.55	445.62	40.79	7/12 7 50	17.47

Forward	189,114.05	59,538.09	83,285.19		480,589.13		437,938.75	42,650.38		22,556.56
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	189,114.05	59,538.09	83,285.19		480,589.13		437,938.75	42,650.38		22,556.56
July 16th, 1904										
26			52.12	65.76	65.76	60.49	60.49	5.27	7/20 7	42 2.25
July 23rd, 1904										
27			385.12	482.00	482.00	443.44	443.44	38.56	7/26 7	36 16.42

Forward	189,114.05	59,538.09	83,724.03		481,136.89		438,442.68	42,694.21		22,575.23
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	189,114.05	59,538.09	83,724.03		481,136.89		438,442.68	42,694.21		22,575.23
Aug. 2nd, 1904			443.19	554.94	554.94	510.54	510.54	44.40	8/6 7 25	18.82
28										

Forward	189,114.05	59,538.09	84,168.02		481,691.83		438,953.22	42,738.61		22,594.05
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	189,114.05	59,538.09	84,168.02		481,691.83		438,953.22	42,738.61		22,594.05
Sept. 9th, 1904	439.12			681.38		615.44				
29		44.08		62.16		57.72				
			75.11	94.44	837.98	86.88	760.04	77.94	9/13 6 352	32.63
Sept. 16th, 1904	445.17			691.07		624.19				
30		57.14		80.78		75.01				
			103.10	129.38	901.23	119.02	818.22	83.01	9/20 6 345	34.65
Sept. 23rd, 1904	447.04			693.16		626.08				
31		149.15		209.65		194.68				
			102.10	128.13	1,030.94	117.88	938.64	92.30	9/27 6 338	38.40
Oct. 2nd, 1904	272.02			421.76		380.94				
32		93.19		131.53		122.13				
			89.17	112.31	665.60	103.33	606.40	59.20	10/6 6 329	24.55
Oct. 9th, 1904	38.11			59.75		53.97				
33		17.11		24.57		22.81				
			154.15	193.44	277.76	177.96	254.74	23.02	10/13 6 322	9.52
Oct. 15th, 1904	241.00			373.55		337.40				
34		37.19		53.13		49.33				
			170.08	213.00	639.68	195.96	582.69	56.99	10/20 6 315	23.47
Oct. 23rd, 1904	416.05			645.19		582.75				
25			160.13	200.81	846.00	184.75	767.50	78.50	10/27 6 308	32.32
Nov. 1st, 1904	709.16			1,100.19		993.72				
36		480.11		672.77		624.71				
			333.16	417.25	2,190.21	383.87	2,002.30	187.91	11/5 6 299	77.02
Nov. 8th, 1904	114.15			177.86		160.65				
37		311.10		436.10		404.95				
			147.11	184.44	798.40	169.68	735.28	63.12	11/13 6 291	25.77
Nov. 16th, 1904	425.17			660.07		596.19				
38		237.08		332.36		308.62				
			219.12	274.50	1,266.93	252.54	1,157.35	109.58	11/19 6 285	44.68
Nov. 23rd, 1904	331.19			514.52		464.73				
39		178.02		249.34		231.53				
			120.12	150.75	914.61	138.69	834.95	79.66	11/26 6 278	32.39

Forward	192,997.03	61,147.06	85,846.17		492,061.17		448,411.33	43,649.84		22,969.45
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
Forward	192,997.03	61,147.06	85,846.17		492,061.17		448,411.33	43,649.84	Yrs. Days.	22,969.45
Dec. 3rd, 1904	694.17			1,077.02		972.79				
40		185.09		259.63		241.08				
Dec. 9th, 1904	118.01		394.14	493.38	1,830.03	453.90	1,667.77	162.26	12/8	6 266 65.59
41		174.16		182.98		165.27				
Dec. 16th, 1904	291.06		110.09	244.72		227.24				
42		298.03		138.06	565.76	127.01	519.52	46.24	12/13	6 261 18.65
Dec. 23rd, 1904	37.16		316.14	451.52		407.82				
43		143.19		417.41		387.60				
Jan. 2nd, 1905	68.01		217.11	395.88	1,264.81	364.20	1,159.62	105.19	12/20	6 254 42.31
44		456.18		58.59		52.92				
Jan. 10th, 1905				201.53		187.13				
45				271.94	532.06	250.18	490.23	41.83	12/28	6 246 16.74
Jan. 17th, 1905				105.48		95.27				
46-2				639.66		593.97				
				616.94	1,362.08	567.58	1,256.82	105.26	1/7	6 236 42.04
				466.06		432.77				
				220.06	686.12	202.46	635.23	50.89	1/12	6 231 20.28
				800.73		743.53				
				176.02	1,020.86	202.51	946.04	74.82	1/19	(6 (224 33.95
				\$1.20						
				213.06	255.96	245.29	245.29	10.67	1/19	(
Jan 24th, 1905		460.05		644.35		598.33				
3			344.11	413.46	1,057.81	396.23	994.56	63.25	1/26	6 217 25.05
Feb. 2nd, 1905	222.15			345.26		311.85				
4		460.17		645.19		599.10				
Feb. 9th, 1905	356.17		330.19	397.14	1,387.59	380.59	1,291.54	96.05	2/9	6 203 37.83
5		407.00		553.12		499.59				
Feb. 16th, 1905				569.80		529.10				
6			230.18	277.08	1,400.00	265.53	1,204.22	105.78	2/11	6 201 41.63
Feb. 23rd, 1905	491.07			438.83		407.48				
7		648.08	133.05	159.90	598.73	153.24	560.72	38.01	2/18	6 194 14.91
				761.59		687.89				
				907.76		842.92				
			149.04	179.04	1,848.39	171.58	1,702.39	146.00	2/28	6 184 57.04
Forward	195,278.03	65,601.07	87,731.19	@ 1.25	505,871.37		461,175.28	44,696.09		23,385.47
				1,402.03	@ 1.20					

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	195,278.03	65,601.07	1,402.03		505,871.37		461,175.28	44,696.09		23,385.47
March 2nd, 1905	268.03			415.63		375.41				
8		514.00		719.60		668.20				
			584.13	701.58	1,836.81	672.35	1,715.96	120.85	3/7 6 177	47.08
March 9th, 1905	57.17			89.67		80.99				
9		322.00		450.80		418.60				
			349.18	419.88	960.35	402.38	901.97	58.38	3/11 6 173	22.69
March 16th, 1905	623.05			966.04		872.55				
10		580.09		812.63		754.58				
			513.18	616.68	2,395.35	590.98	2,218.11	177.24	3/18 6 166	68.70
March 23rd, 1905	474.19			736.17		664.93				
11		521.16		730.52		678.34				
			590.07	708.42	2,175.11	678.90	2,022.17	152.94	3/25 6 159	59.11
April 2nd, 1905	440.14			683.09		616.98				
12		840.11		1,176.77		1,092.71				
			701.18	842.28	2,702.14	807.18	2,516.87	185.27	4/8 6 145	71.16
April 9th, 1905	29.09			45.65		41.23				
13		160.12		224.84		208.78				
			194.09	233.34	503.83	223.62	473.63	30.20	4/13 6 140	11.57
April 16th, 1905	561.18			870.95		786.66				
14		479.08		671.16		623.22				
			430.14	516.84	2,058.95	495.30	1,905.18	153.77	4/20 6 133	58.74
April 23rd, 1905	370.01			573.58		518.07				
15		382.11		535.57		497.31				
			265.12	318.72	1,427.87	305.44	1,320.82	107.05	4/27 6 126	40.79
May 2nd, 1905	688.02			1,066.56		963.34				
16		829.07		1,161.09		1,078.15				
			574.10	689.40	2,917.05	660.67	2,702.16	214.89	5/6 6 117	81.55
May 8th, 1905	101.08			157.17		141.96				
17		525.04		735.28		682.76				
			243.17	292.62	1,185.07	280.42	1,105.14	79.93	5/11 6 112	30.26
May 16th, 1905		643.04		900.48		836.16				
			412.12	495.12	1,395.60	474.49	1,310.65	84.95	5/18 6 105	32.07
May 23rd, 1905		576.11		807.17		749.51				
19			493.19	592.74	1,399.91	568.04	1,317.55	82.36	5/25 6 98	30.99
June 2nd, 1905	283.07			439.19		396.69				
20		858.03		1,201.41		1,115.59				
			670.00	804.00	2,444.60	770.50	2,282.78	161.82	6/8 6 84	60.52
June 16th, 1905	66.07			102.84		92.89				
22		592.02		828.94		769.73				
			304.02	364.92	1,296.70	349.71	1,212.33	84.37	6/20 6 72	31.38
June 9th, 1905	77.15			120.51		108.85				
21		396.10		555.10		515.45				
			345.03	414.18	1,089.79	396.92	1,021.22	68.57	6/13 6 79	25.60
Forward	199,321.08	73,823.15	8,077.15		531,660.50		485,201.82	46,458.68		24,057.68

	Prepared	Pea	Buck.	Amt. Chgd.	Tot
Forward	199,321.08	73,823.15	8,077.15		531,660
June 23rd, 1905	381.07	"		591.09	
23		473.19		663.53	
			348.09	418.14	1,672
July 2nd, 1905	460.09			713.70	
24		815.02		1,141.14	
			516.05	619.50	2,474
July 9th, 1905		54.09		76.23	
25			87.03	104.58	180

Forward	200,163.04	75,167.05	9,029.12		535,980
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	Adj. Basis	Total	Excess	Time	Interest
				Yrs. Days.	
0		485,201.82	46,458.68		24,057.68
	533.89				
	616.13				
6	400.72	1,550.74	122.02	6/27 6 65	45.24
	644.63				
	1,059.63				
4	593.69	2,297.95	176.39	7/8 6 54	65.08
	70.78				
1	100.22	171.00	9.81	7/13 6 49	3.61

	489,221.51	46,766.90		24,171.61
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	200,163.04	75,167.05	9,029.12		535,988.41		489,221.51	46,766.90		24,171.61
July 16th, 1905	660.12			1,023.93		924.84				
26		470.10		658.70		611.65				
			289.06	347.16	2,029.79	332.69	1,869.18	160.61	7/20 6 42	58.95
July 23rd, 1905	287.06			445.32		402.22				
27		462.06		647.22		600.99				
			415.09	498.54	1,591.08	477.76	1,480.97	110.11	7/27 6 35	40.28
Aug. 2nd, 1905	575.08			891.87		805.56				
28		852.13		1,193.71		1,108.44				
			545.08	654.48	2,740.06	627.21	2,541.21	198.85	8/8 6 23	72.35
Aug. 9th, 1905	191.11			296.90		268.17				
29		238.02		333.34		309.53				
			181.07	217.62	847.86	208.55	786.25	61.61	8/12 6 19	22.37
Aug. 16th, 1905	466.03			722.53		652.61				
30		128.00		179.20		166.40				
			91.15	110.10	1,011.83	105.51	924.52	87.31	8/21 6 10	31.58
Aug. 23rd, 1905	1,099.06			1,703.92		1,539.02				
31		477.18		669.06		621.27				
			392.18	471.48	2,844.46	451.83	2,612.12	232.34	8/26 6 5	83.84
Sept. 2nd, 1905	2,043.17			3,167.97		2,861.39				
32		1,052.05		1,473.15		1,367.93				
			960.16	1,152.96	5,794.08	1,104.92	5,334.24	459.84	9/9 5 356	165.24
Sept. 9th, 1905	290.04			449.81		406.28				
33		197.19		277.13		257.33				
			133.01	159.66	886.60	153.00	816.61	69.99	9/12 5 353	25.12
Sept. 16th, 1905	573.00			888.15		802.20				
34		607.15		850.85		790.07				
			373.03	447.78	2,186.78	429.12	2,021.39	165.39	9/19 5 346	59.12
Sept. 23rd, 1905	613.11			951.00		858.97				
35		457.01		639.87		594.17				
			279.01	334.86	1,925.73	320.90	1,774.04	151.69	9/26 5 339	54.10
Oct. 3rd, 1905	1,323.16			2,051.89		1,853.32				
36		669.06		937.02		870.09				
			541.03	649.38	3,638.29	622.32	3,345.73	292.56	10/7 5 328	103.78

Forward	208,287.18	80,781.00	13,232.19		561,484.97		512,727.77	48,757.20		24,888.34
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	208,287.18	80,781.00	13,232.19		561,484.97		512,727.77	48,757.20		24,888.34
Oct. 10th, 1905	523.11			811.50		732.97				
37		255.15		358.05		332.47				
			250.11	300.66	1,470.21	288.13	1,353.57	116.64	10/12 5 323	41.29
Oct. 17th, 1905	562.01			871.18		786.87				
38		355.04		497.28		461.76				
			254.12	305.52	1,673.98	292.79	1,541.42	132.56	10/19 5 316	46.72
Oct. 24th, 1905	371.14			576.14		520.38				
39		556.05		778.75		723.12				
			318.02	381.72	1,736.61	365.82	1,609.32	127.29	10/26 5 309	44.73
Nov. 2nd, 1905	493.09			764.85		690.83				
40		427.19		599.13		556.33				
			160.10	192.60	1,556.58	184.57	1,431.73	124.85	11/7 5 297	43.64
Nov. 9th, 1905	334.13			518.71		468.51				
41		252.09		353.43	872.14	328.18	796.69	75.45	11/13 5 291	26.28
Nov. 16th, 1905	1,232.10			1,910.38		1,725.50				
42		237.05		332.15	2,242.53	308.42	2,083.92	208.61	11/18 5 286	72.54
Nov. 23rd, 1905	312.17			484.92		437.99				
43		191.13		268.31		249.14				
			329.00	394.80	1,148.03	378.35	1,065.48	82.55	11/25 5 279	28.63
Dec. 2nd, 1905	798.19			1,238.37		1,118.53				
44		450.11		630.77		585.71				
			543.10	652.20	2,521.34	625.03	2,329.27	192.07	12/7 5 267	66.17
Dec. 9th, 1905	290.02			449.66		406.14				
45		76.07		106.89		99.25				
			363.05	435.90	992.45	417.73	923.12	69.33	12/12 5 262	23.80
Dec. 16th, 1905	93.17			145.47		131.39				
46		521.10		730.10		677.95				
			296.13	365.98	1,231.55	341.15	1,150.49	81.06	12/19 5 255	27.76
Dec. 23rd, 1905	72.15			112.76		101.85				
47		99.08		139.16		129.22				
			112.10	135.00	386.92	129.37	360.44	26.48	12/28 5 246	9.01
Jan. 2nd, 1906	470.17			729.82		659.19				
48		633.18		887.46		824.07				
			612.04	734.64	2,351.92	704.03	2,187.29	164.63	1/9 5 234	55.83
Jan. 9th, 1906	234.02			362.86		327.74				
1		300.14		420.98		390.91				
			168.10	202.20	986.04	193.77	912.42	73.62	1/11 5 232	24.95
Jan. 16th, 1906	558.17			866.22		782.39				
2		402.00		562.80		522.60				
			396.12	475.92	1,904.94	456.09	1,761.08	143.86	1/18 5 225	48.56
Jan. 23rd, 1906	1,445.18			2,241.15		2,024.26				
3		687.16		962.92		894.14				
			342.15	411.30	3,615.37	394.16	3,312.56	302.81	1/25 5 218	101.85
Forward	216,084.00	86,229.14	17,381.13		586,175.58		535,496.57	50,679.01		25,550.10

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	216,084.00	86,229.14	17,381.13		586,175.58		535,496.57	50,679.01		25,550.10
Feb. 2nd, 1906	2,908.19			4,508.87		4,072.53				
4		887.09		1,242.43		1,153.68				
Feb. 9th, 1906	157.04		691.18	830.28	6,581.58	795.68	6,021.89	559.69	2/8 5 204	186.94
5		220.18		243.66		220.08				
Feb. 16th, 1906	613.00		153.01	309.26	736.58	287.17	683.25	53.33	2/14 5 198	17.75
6		378.06		183.66		176.00				
Feb. 23rd, 1906	1,612.19		206.19	950.15	1,728.11	858.20	1,587.98	140.13	2/20 5 192	46.51
7		457.18		529.62		491.79				
March 2d, 1906	1,002.01		338.13	248.34	3,547.51	237.99	3,242.85	304.66	2/27 5 185	100.80
8		628.18		2,500.07		2,258.13				
March 9th, 1906	926.07		371.10	641.06	2,879.44	596.27	2,647.66	231.78	3/8 5 176	76.34
9		421.07		406.38		389.45				
Mar. 16th, 1906	1,226.18		430.09	1,553.18	2,542.27	1,402.87	2,339.65	202.62	3/13 5 171	66.58
10		496.09		880.46		817.57				
Mar. 23rd, 1906	928.03		327.18	1,435.84	2,990.21	1,296.89	2,740.12	250.09	3/20 5 164	81.86
11		203.09		589.89		547.75				
April 2nd, 1906	1,856.05		270.19	516.54	2,048.60	495.01	1,875.48	173.12	3/27 5 157	56.47
12		305.01		1,901.70		1,717.66				
April 9th, 1906	192.15		770.10	695.03	4,228.86	645.38	3,881.38	347.48	4/7 5 146	112.68
13		39.06		393.48		377.08				
May 23rd, 1906	728.04		50.07	1,438.63	414.20	377.08	378.84	35.26	4/13 5 140	11.43
14		154.12		284.83		264.48				
June 2nd, 1906	409.17		124.04	325.14	1,494.19	311.59	1,363.29	130.90	5/26 5 97	41.39
15		673.11		2,877.19		2,598.75				
June 9th, 1906	72.13		357.02	427.07	2,006.76	396.56	1,860.06	146.70	6/9 5 83	46.04
16		179.17		924.60		886.07				
June 16th, 1906	345.16		179.01	298.76	579.26	269.85	541.42	37.84	6/12 5 80	11.86
17		477.08		55.02		51.09				
			216.00	60.42	1,463.55	57.90	1,353.14	110.41	6/19 5 73	34.47
Forward	229,065.01	91,754.03	21,870.04		619,416.70		566,013.58	53,403.12		26,441.22

	Prepared	Pea	Buck.	Amt. Chgd
Forward	229,065.01	91,754.03	21,870.04	0
June 23rd, 1906	634.09			983.40
18		395.06		553.42
			339.03	406.98

Forward	229,699.10	92,149.09	22,209.07	0
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hgd.	Total	Adj. Basis	Total	Excess	Time	Interest
					Yrs. Days.	
	619,416.70		566,013.58	53,403.12		26,441.22
0		888.23				
2		513.89				
8	1,943.80	390.02	1,792.14	151.66	6/26 5 66	47.17

621,360.50

567,805.72 53,554.78

26,488.39

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	229,699.10	92,149.09	22,209.07		621,360.50		567,805.72	53,554.78		26,488.39
July 2nd, 1906	1,356.11			2,102.65		1,899.17				
19		864.11		1,210.37		1,123.91				
			604.08	725.28	4,038.30	695.06	3,718.14	320.16	7/10 5 52	98.82
July 9th, 1906	113.18			176.55		159.46				
20		143.15		201.25		186.87				
			161.09	193.74	571.54	185.67	532.00	39.54	7/12 5 50	12.19
July 17th, 1906		249.02		348.74		323.83				
21			299.14	359.64	708.38	344.65	668.48	39.90	7/19 5 43	12.25
July 24th, 1906		331.13		464.31		431.14				
22			349.12	419.52	883.83	402.04	833.18	50.65	7/25 5 37	15.50
Aug. 2nd, 1906	242.06			375.57		339.22				
23		446.15		625.45		580.77				
			507.00	608.40	1,609.42	583.05	1,503.04	106.38	8/9 5 22	32.31
Aug. 9th, 1906	221.11			343.40		310.17				
24		101.19		142.73		132.53				
			223.14	268.44	754.57	257.25	699.95	54.62	8/11 5 20	16.57
Aug. 16th, 1906	395.07			612.79		553.49				
25		562.05		787.15		730.92				
			66.10	79.80	1,479.74	76.47	1,360.88	118.86	8/18 5 13	35.92
Aug. 23rd, 1906	326.09			506.00		457.03				
26		345.13		483.91		449.34				
			294.08	353.28	1,343.19	338.56	1,244.93	98.26	8/25 5 6	29.58

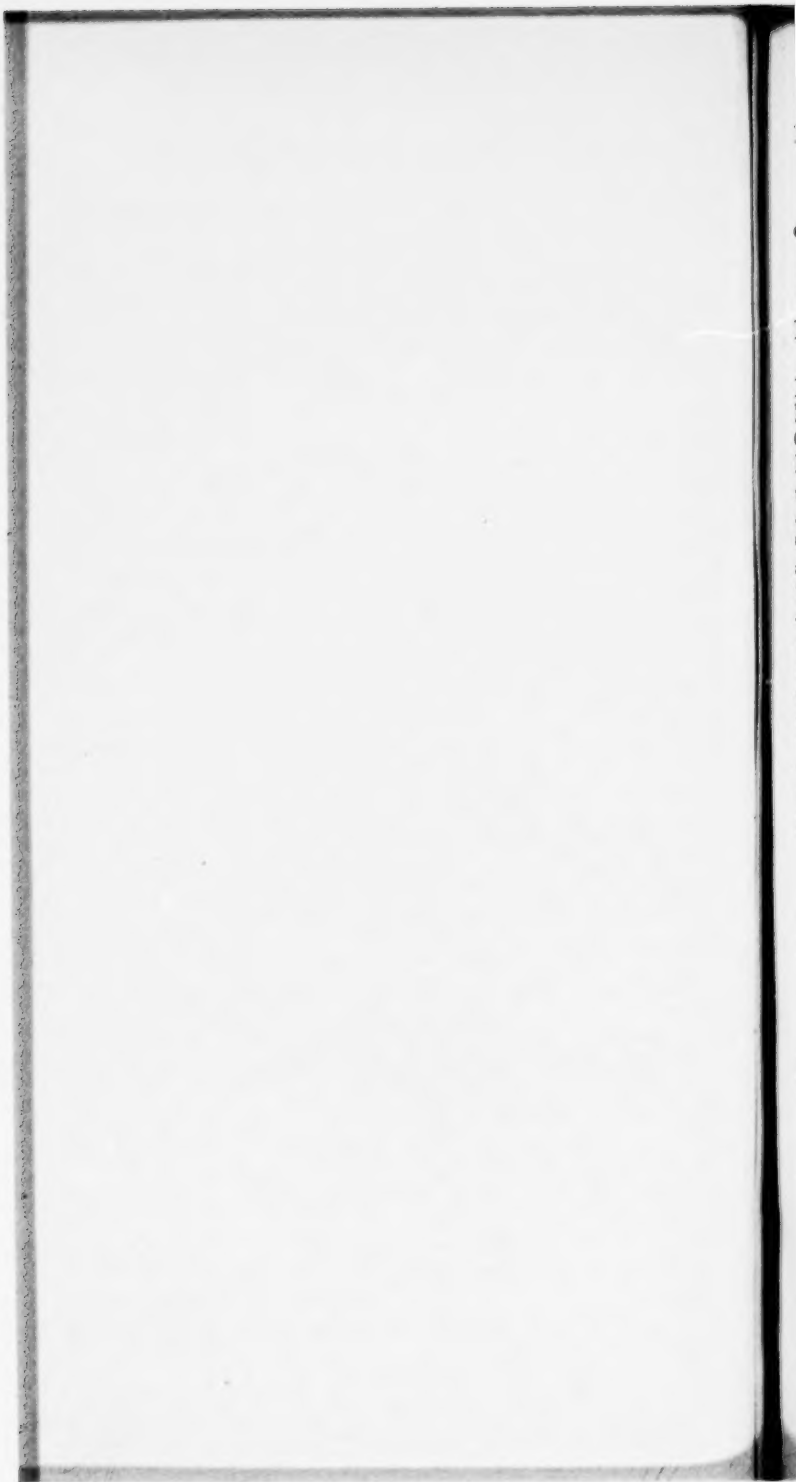
Forward	232,355.12	95,195.02	24,716.02		632,749.47		578,366.32	54,383.15		26,741.53
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	232,355.12	95,195.02	24,716.02		632,749.47		578,366.32	54,383.15		26,741.53
Sept. 2nd, 1906	39.06			60.92		55.02				
27		870.07		1,218.49		1,131.45				
			744.14	893.64	2,173.05	856.40	2,042.87	130.18	9/8 4	357 38.98
Sept. 9th, 1906		153.00		214.20		198.90				
28			70.05	84.30	298.50	80.79	279.69	18.81	9/13 4	352 5.62
Sept. 16th, 1906		335.08		469.56		436.02				
29			267.11	321.06	790.62	307.68	743.70	46.92	9/20 4	345 13.96
Sept. 23rd, 1906		352.07		493.29		458.05				
30			205.07	246.42	739.71	236.15	694.20	45.51	9/27 4	338 13.53
Oct. 2nd, 1906	96.16			150.04		135.52				
31		531.11		744.17		691.01				
			543.10	652.20	1,546.41	625.02	1,451.55	94.86	10/9 4	326 27.93
Oct. 9th, 1906		214.00		299.60		278.20				
32			188.02	225.72	525.32	216.32	494.52	30.80	10/12 4	323 9.06
Oct. 16th, 1906	26.07			40.84		36.89				
33		327.15		458.85		426.07				
			351.02	421.32	921.01	403.76	866.72	54.29	10/18 4	317 15.88

Forward	232,518.01	97,979.10	27,086.13		639,744.09		584,939.57	54,804.52		26,866.40
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	232,518.01	97,979.10	27,086.13		639,744.00		584,939.57	54,804.52		26,866.49
Oct. 23rd, 1906		418.18		586.46		544.57				
34			280.03	336.18	922.64	322.17	866.74	55.90	10/25 4 310	16.30
Nov. 2nd, 1906		217.09		304.43		282.68				
35			590.18	709.08	1,013.51	679.53	962.21	51.30	11/8 4 296	14.83
Nov. 16th, 1906		224.16		314.72		292.24				
36			327.03	392.58	707.30	376.22	668.46	38.84	11/20 4 284	11.17
Nov. 23rd, 1906		178.12		250.04		232.18				
37			470.02	564.12	814.16	540.61	772.79	41.37	11/27 4 277	11.82
Dec. 2nd, 1906			858.13	1,030.38	1,030.38	987.44	987.44	42.94	12/8 4 266	12.17
38										
Dec. 9th, 1906	117.07			181.89		164.29				
39			403.01	483.66	665.55	463.50	627.79	37.76	12/13 4 261	10.71
Dec. 16th, 1906	118.06			183.37		165.62				
40			472.06	566.76	750.13	543.15	708.77	41.36	12/20 4 254	11.67
Dec. 23rd, 1906	320.12			496.93		448.84				
41			363.05	435.90	932.83	417.74	866.58	66.25	12/27 4 247	18.62
Jan. 1st, 1907	403.13			625.66		565.11				
42			446.19	536.34	1,162.00	513.99	1,079.10	82.90	1/8 4 235	23.15
Jan. 9th, 1907	25.00			38.75		35.00				
43			168.15	202.50	241.25	194.06	229.06	12.19	1/12 4 231	3.39
Jan. 16th, 1907	177.10			275.13		248.50				
2		173.07		242.69		225.35				
			326.08	391.68	909.50	375.36	849.21	60.29	1/19 4 224	16.71
Jan. 23rd, 1907	566.09			878.00		793.03				
3		127.02		177.94		165.23				
			363.19	436.74	1,492.68	418.54	1,376.80	115.86	1/26 4 217	32.61
Feb. 2nd, 1907	776.07			1,203.34		1,086.89				
4		275.09		385.63		358.08				
			805.02	966.12	2,555.00	925.86	2,370.83	184.26	2/9 4 203	50.44
Feb. 8th, 1907	356.00			551.80		498.40				
5		203.08		284.76		264.42				
			238.02	285.72	1,122.28	273.81	1,036.63	85.65	2/13 4 199	23.41
Feb. 16th, 1907	216.02			334.96		302.54				
6		122.19		172.13		159.83				
			120.00	144.00	651.00	138.00	606.37	50.72	2/19 4 193	13.81
Feb. 23rd, 1907	598.17			928.22		838.39				
7		426.15		597.45		554.77				
			562.14	675.24	2,200.91	647.10	2,049.26	160.65	2/28 4 184	43.50
Forward	236,194.04	100,348.05	33,884.03		656,915.39		600,982.61	55,932.78		27,180.20

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	236,194.04	100,348.05	33,884.03		656,915.39		600,982.61	55,932.78		27,180.20
March 2nd, 1907	961.15			1,490.71		1,346.45				
8		496.01		694.47		644.86				
			357.11	429.06	2,614.24	411.18	2,402.49	211.75	3/9 4 175	59.00
March 9th, 1907	510.10			791.28		714.70				
9		242.02		338.94		314.73				
			145.01	174.06	1,304.28	166.81	1,196.24	108.04	3/12 4 172	29.02
March 16th, 1907	509.02			789.11		712.74				
10		302.01		422.87		392.66				
			132.11	159.06	1,371.04	152.43	1,257.83	113.21	3/19 4 165	30.28
Mar. 23rd, 1907	1,680.05			2,604.39		2,352.35				
11		587.08		822.36		763.62				
			484.16	581.76	4,008.51	557.52	3,673.49	335.02	3/26 4 158	89.23
April 2nd, 1907	2,772.02			4,296.76		3,880.94				
12		777.03		1,088.01		1,010.29				
			776.04	931.44	6,316.21	892.63	5,783.86	532.35	4/6 4 147	140.79
April 9th, 1907	341.10			529.33		478.10				
13		81.17		114.59		106.40	584.50	59.42	4/11 4 142	15.68
April 16th, 1907	610.08			946.12		954.56				
14		246.13		345.31	1,291.43	320.64	1,175.20	116.23	4/18 4 135	30.50
April 23rd, 1907	514.16			797.94		720.72				
15		375.02		525.14		487.63				
			123.06	147.96	1,471.04	141.80	1,350.15	120.89	4/25 4 128	31.59
May 2nd, 1907	746.04			1,156.61		1,044.68				
16		623.19		873.53		811.13				
			696.00	835.20	2,865.34	800.40	2,656.21	209.13	5/7 4 116	54.23
May 9th, 1907	229.11			355.80		321.37				
17		177.04		248.08		230.36				
			166.18	200.28	804.16	191.94	743.67	60.49	5/11 4 112	15.64
May 16th, 1907	227.19			353.32		319.13				
18		530.11		742.77		689.71				
			421.17	506.22	1,692.31	485.13	1,493.97	108.34	5/18 4 105	27.89
May 23rd, 1907	362.07			561.64		507.29				
19		445.13		623.91		579.34				
			308.02	369.72	1,555.27	354.32	1,440.95	114.32	5/27 4 96	29.26
June 2nd, 1907	691.00			1,071.05		967.40				
20		485.06		679.42	1,750.47	630.89	1,598.29	152.18	6/8 4 84	38.65
June 9th, 1907	319.00			494.45		446.60				
21		121.06		169.82	664.27	157.69	604.29	59.98	6/13 4 79	15.18
June 16th, 1907,	595.03			922.48		833.21				
22		175.14		245.98	1,168.46	228.41	1,061.62	106.84	6/20 4 72	26.92
				298.38	298.38	269.50	269.50	28.88	6/27 4 65	7.25
June 23rd, 1907	192.10									
23										
July 2nd, 1907	193.06			299.62		270.62				
24		308.01		431.27	730.89	400.47	671.09	59.80	7/9 4 53	14.88
Forward	247,651.12	106,324.06		37,496.09@1.20	687,687,375.61		628,945.96	58,429.65		27,836.19
Deduct a/c of claims paid and errors as per agreement	780.17	272.17		87,731.19@1.25	2,000.34		2,000.34	193.20		85.55
	246,870.15	106,051.09		87,250.00@1.25	685,375.27		626,945.62	58,236.45		27,750.64



3

TUESDAY, November 12, 1912—10 a. m.

Present: Parties as before.

Mr. Glasgow and Mr. Platt argued further the questions raised in defendant's points for charge.

Charge of the Court.

DR. JAMES B. HOLLAND, J.:

Gentlemen of the Jury: The plaintiff in this case, Henry E. Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, vs. The Lehigh Valley Railroad Company, instituted suit there upon two Reports made by the Interstate Commerce Commission. The suit is based, Gentlemen of the Jury, upon those Reports and upon the amounts which the Reports show were awarded by the Commission against the defendant in favor of the plaintiff, for alleged discrimination under the Interstate Commerce Act, Section 1, and for the collection of unreasonable rates for the transportation of coal, the total amount of which, together with interest, is \$107,555.58, with interest from the 1st day of August, 1912, amounting, claimed by the plaintiff, to a sum equal to \$109,280.17. As I have said, Gentlemen of the Jury, this suit is brought to recover on an award made by the Interstate Commerce Commission to this plaintiff against the Lehigh Valley Railroad Company, as reparation for the collection of freights which, it was claimed, was in violation of the Interstate Commerce Act. It appears that the plaintiff was transporting coal over the Lehigh Valley Railroad from what is known as the Wyoming coal fields in Pennsylvania to New York, by way of Perth Amboy, from the 1st of August, 1900, until August 1, 1907.

Mr. GLASGOW: From August 1, 1901, to July 17, 1907, your Honor.

The COURT: To July 17, 1907, for which period the complaint was made before the Interstate Commerce Commission.

Mr. GLASGOW: If you will permit me, your Honor, I misled you; from November 1, 1900, to August 1, 1901, was the charge of discrimination.

The COURT: But including both suits it was what?

Mr. GLASGOW: It was from November 1, 1900, to July 17, 1907.

The COURT: The plaintiff, then, was engaged in transporting coal over the Lehigh Valley from the Wyoming fields to New York by the way of Perth Amboy, for the period from November 1, 1900, to the 17th day of July, 1907, for which period complaint was made by the plaintiff before the Interstate Commerce Commission, and a claim for damages was made before that Commission, as he had a right to do, and for a period between November 1, 1900, and August 1, 1901, he claimed a certain amount for discrimination made against him by this defendant Company, according to the evidence, in that there were certain rates given to the plaintiff's competitor, transporting coal from the same point to the same destination.

tion over the same railroad, less than this plaintiff was given, and, as the result, that this plaintiff was damaged in the amount of \$11,009.33 for that period. Plaintiff also alleged that, from the first day of August, 1901, to July 17, 1907, the schedule rates of the Lehigh Valley Railroad Company, the defendant, were too high and were unreasonable, and the Commission, according to the Report offered in evidence here, investigated that question and they found 195 according to that report, that the rates on coal, as scheduled on its tariff and charged to all shippers from the Wyoming Region to Perth Amboy over this Railroad, were too high. That \$1.55 for prepared sizes, \$1.40 for pea coal and \$1.20 for buckwheat was too high, and that it was unreasonable, and that the Railroad Company only should have charged \$1.40 for prepared sizes, \$1.30 for pea coal and \$1.15 for buckwheat, and, therefore, taking into consideration the number of tons that this plaintiff shipped during the period from August 1, 1901 to July 17, 1907, that the plaintiff had been damaged in the sum of \$58,236.45, and the Commission awarded these two amounts to the plaintiff, to wit, \$11,009.33 and \$58,236.45, with interest from the period when the damage accrued, down to the time that the Commission filed their Report, which, as I have said to you totals up the sum of \$107,465.58, to which the plaintiff claims he is entitled to have interest added from August 1, 1912.

That is the claim, Gentlemen of the Jury, and, as I have said, it is based upon the Reports of the Interstate Commerce Commission. The plaintiff had a right to go before the Interstate Commerce Commission and I instruct you that in this case the Interstate Commerce Commission had a right to act. They had a right to act in this case. When the Interstate Commerce Commission takes jurisdiction and acts upon a complaint of a shipper under the Interstate Commerce Act, it is authorized by that Act to do certain things, first, it is authorized to investigate whether there has been an injury, as alleged in the petition, and, if so, to award damages, and then there is a certain procedure pointed out by this Act by which the plaintiff can recover the damages which the Commission awards. When a shipper concludes that he has been injured by a railroad company in the matter of transportation and goes before the Commission, the Commission is authorized by the Interstate Commerce Act to 196 investigate, "and when an investigation shall be made by the said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirements in the premises, and, in case damages are awarded, such report shall include findings of fact on which the award is made." It is objected here, Gentlemen of the Jury, that these reports made by the Commission, upon which this suit is based, are not in accordance with the requirements of this Act and, therefore, you should find for the defendant. But I instruct you, Gentlemen of the Jury, that they are, in the judgment of the Court, in accordance with the requirements of this Section. They state the conclusions as required by the Act and they state the findings of fact upon which the award is based,

and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit.

The Act further directs, Gentlemen of the Jury, when the Commission has investigated an alleged injury presented to it by a shipper and has come to the conclusion that the shipper has been injured and has made an award of reparation for the injury done, fixing the amount, it makes a report and directs the railroad company to pay the shipper that amount. If the railroad company refuses to obey that order, the law gives the Commission no authority to compel the railroad to make that payment. The railroad, so far as the Commission is concerned, may refuse to pay; but the Act of Congress says that, if the railroad refuses to pay the amount awarded by the Commission, the plaintiff may come into a Circuit Court of the United States within one year after that award was made and that Court may hear the case before a Jury and, if found to be a just claim through a verdict of a Court and a Jury, that then the collection of it against the railroad company can be had the same as

any other claim of indebtedness which may be collected in
 197 a court of justice. In the presentation of this claim to the Court and the Jury, the Act of Congress gives the Report a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a Jury for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution. But in that proceeding the suit is on the Report of the finding of the Interstate Commerce Commission and their finding is made *prima facie* evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award and that it has not been paid, and that makes its *prima facie* case of its right to claim. If the defendant company desires, it may go into the question and show that the finding was wrong. It can take up the merits of the case. It can go into the whole defense, whatever defense it may have against the collection of this claim, if it sees fit to do so. But, if it does not see fit to do so, then the Report of the Commission is *prima facie* evidence of its correctness, and when not paid, entitles the plaintiff, in the absence of any controlling circumstances or evidence to the contrary, to judgment before a Jury for the amount of his claim.

Now *prima facie* evidence is such evidence as, in the judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose. It may be rebutted by direct, controlling evidence, or by discriminating circumstances; otherwise, it becomes conclusive of the law; that is, it should oper-

ate upon the minds of the Jury as decisive to found their verdict as to the fact; that is, as to the amount of the claim presented here by the plaintiff. There is no evidence in this case but the plaintiff's evidence, the Report of the Commission, the fact that it is not paid, and the other collateral evidence which was in support, or which was part of the history of the case, as to how it got here. So that the only evidence before you is the prima facie evidence of these claims and, unless there is something in the circumstances which would, in your judgment, contradict the prima facie effect which this evidence is given by law, it would be your duty to find in favor of the plaintiff for the amount which he claims.

Now, Gentlemen of the Jury, the question of the Statute of Limitations has been raised here, but I instruct you that you will have nothing to do with the question of the Statute of Limitations. The matter of its application is not a matter of fact, but it is a matter of law to be considered by the Court, and, for the present, the Court instructs you that there is no Statute of Limitations which bars the recovery of the plaintiff for either of the amounts presented in this suit, and that, if you take the evidence which is made prima facie by the Act of Congress as conclusive of the claim, it will be your duty to render a verdict in favor of the plaintiff for the full amount for both.

The plaintiff asks me to charge you in accordance with certain points.

Mr. GLASGOW: I withdraw those, if your Honor please.

The COURT: The defendant asks me to charge you on certain points, all of which I refuse without reading to the Jury.

Mr. PLATT: Will your Honor allow me to take certain exceptions to your Charge?

199 We except first to the statement of the Court in the Charge that the plaintiff has instituted this suit upon two Reports.

Exception noted as requested by direction of the Court.

To the statement that the suit is based on the Reports and the order.

Exception noted as requested by direction of the Court.

Also to the statement that the suit was brought to enforce the award of the Commission.

Exception noted as requested by direction of the Court.

Also to the statement that the Commission, according to the Report, found that the rates charged to all shippers from the Wyoming Region to Perth Amboy were too high and unreasonable.

Exception noted as requested by direction of the Court.

Also to the statement that the Commission found that the rates of \$1.40 for prepared sizes, \$1.30 for pea coal and \$1.15 for smaller sizes were reasonable.

Exception noted as requested by direction of the Court.

Also to the statement that the Commission found that Meeker sustained damage, or found Meeker damaged.

Exception noted as requested by direction of the Court.

Also to the statement of the Court that this suit is based on the Report of the Interstate Commerce Commission.

Exception noted as requested by direction of the Court.

200 Also to the statement that the plaintiff had the right to go before the Commission and that the Commission had the right to act in the case.

Exception noted as requested by direction of the Court.

Also to the statement that the Reports and orders of the Commission are in accordance with the language which the Court read from Section 14 of the Act.

Exception noted as requested by direction of the Court.

Also to the statement that the Reports state sufficient findings of fact to sustain this suit.

Exception noted as requested by direction of the Court.

Also to the statement that the Interstate Commerce Act gives the Report a certain effect as evidence.

Exception noted as requested by direction of the Court.

Also to the statement that the Act provides that the defendant shall have its day in court.

Exception noted as requested by direction of the Court.

Also to the statement that the Act provides that the defendant shall have a trial according to the Constitution.

Exception noted as requested by direction of the Court.

Also to the statement that the plaintiff has only to show that an award was made by the Commission and was not paid, and that makes a prima facie case.

Exception noted as requested by direction of the Court.

Also to the statement that the award and the fact that it is not paid proves the plaintiff's case.

201 The COURT: I did not say that.

Mr. PLATT: Perhaps I have misquoted your Honor. I will withdraw that. I do not want, of course, to except to something your Honor says you did not say.

The COURT: I did not exactly put it in that way, but you may leave it that way and get what I did say.

Mr. PLATT: We will correct it from the notes.

(The following sentence is referred to: "But in that proceeding the suit is on the Report of the finding of the Interstate Commerce Commission and their finding is made prima facie evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, and that makes its prima facie case of its right to claim.")

Mr. PLATT: I except also to the statement that, if the defendant does not see fit to do so—that is, to go into the case—then the Report of the Commission is prima facie evidence of its correctness and entitles the plaintiff, in the absence of controlling circumstances or evidence, to judgment.

Exception noted as requested by direction of the Court.

Also to the statement that, unless there is something in the cir-

cumstances which, in the Jury's judgment, would control the effect which is given to this evidence, it would be the Jury's duty to find for the plaintiff for the amount which he claims.

Exception noted as requested by direction of the Court.

202 Also to the statement that the Jury has nothing to do with the question of the Statute of Limitations.

Exception noted as requested by direction of the Court.

Also to the statement that there is no Statute of Limitations which bars the recovery of the plaintiff for either of the claims in this suit, and it will be the Jury's duty to find the full amount for both of the claims.

Exception noted as requested by direction of the Court.

Also to the statement that "it is objected that the Reports are not in accordance with the requirements of this Act, but I instruct you that they are in accordance with the provisions of the Act."

Exception noted as requested by direction of the Court.

Also to the statement that the Reports state the conclusions and findings upon which this award is based.

Exception noted as requested by direction of the Court.

Also to the statement that the award is based upon sufficient findings of fact to sustain this suit.

Exception noted as requested by direction of the Court.

The points for Charge submitted by defendant, which were refused by the Court without reading them to the Jury, are as follows:

"Upon the whole case, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

203 "The order and reports on which the petitioner relies, both for the establishment of his case in this Court and for the jurisdiction of this Court in this action, are invalid, unconstitutional and void, in that they deprive the defendant of due process of law, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and findings of the Commission were invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by Jury. The order and findings assume to take from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case; and further, in effect, impose upon this Court, as evidence in this case, that which is not legal evidence; and further, to impose upon this Court as findings of the

Commission, conclusions not based on findings, and therefore the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and findings upon which the plaintiff's case rests are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was
204 made, and which, therefore, was not subject to regulation at that time; it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated; the power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The award made in the reparation order is not based on the findings of fact required by the Act, as the Act requires that, in case damages are awarded, such reports shall include the findings of fact on which the award is made; and the report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff prior to July 17, 1907, were unreasonable, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"It appears on the face of the order and in the Report that the total amount awarded by the Interstate Commerce Commission was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907, and
205 that each such shipment was the basis of a separate cause of action. There was no finding by the Commission as to the several amounts due upon the several causes of action, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no evidence before the Court of any discrimination on the part of the defendant, as charged in the petition, from November 1, 1900, to August 1, 1901, and the alleged causes of action referred to in Paragraph III of the petition, as having arisen through acts of discrimination on the part of the defendant, occurring from November 1, 1900, to August 1, 1901, have not been proved and

are not sustained by the findings of the Commission, or by any evidence before this Court, and, therefore, the petitioner cannot recover upon any of the alleged items of damage for shipments prior to August 1, 1901."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no evidence showing, or tending to show, that the petitioner was in any way damaged, or could have been damaged, by the alleged acts of discrimination charged to have been performed by the defendant between November 1, 1900, and August 1, 1901, and, therefore, the petitioner cannot recover upon any of the alleged items of damages for shipments prior to August 1, 1901."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

206 "There is no competent evidence in this case, either by way of findings or statements or evidence of any kind, that the rates charged by the defendant railroad for transporting coal to Perth Amboy, from August 1, 1901, to July 17, 1907, were unreasonable, unjust or excessive, and, therefore, the petitioner cannot recover for any of the items of damage for shipments between August 1, 1901, and July 17, 1907."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no competent evidence, either by way of findings or statements or any other evidence in this case, that the petitioner was in any way damaged by the alleged imposition of unreasonable rates on the part of the railroad, between August 1, 1901, and July 17, 1907, and, therefore, the petitioner cannot recover for items of damages on shipments between August 1, 1901, and July 17 1907."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no competent evidence either by way of findings or statements, or any other evidence in this case, that the reduced rates on which the amount of the alleged reparation is computed, were at any time between August 1, 1901 and July 17, 1907, reasonable or duly compensatory, and, therefore, the petitioner cannot recover on any of the items of damages for shipments between August 1, 1901, and July 17, 1907."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

207 "The order and findings do not show that petitioner has been injured. On the contrary, they show that the award of reparation to him is a discrimination in his favor against other shippers, and a judgment in his favor would constitute such discrimination; therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Inasmuch as it appears that petitioner was charged and paid the correct tariff rates, according to tariffs duly filed pursuant to Section 6 of the Act, therefore, petitioner cannot recover back any part of the freights so paid to the railroad; and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and Reports upon which petitioner rests his case are invalid and void, because in the proceedings before the Commission, the Commission failed to give to the defendant railroad the hearing provided for in the Interstate Commerce Act, which said hearing, the Act provides, shall be a condition precedent to the making of any valid order or findings, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Since this suit is for the recovery of penalties for alleged violations of the Act to Regulate Commerce, recovery is barred by the Federal Statute of Limitations, Section 1047 of the Revised Statutes, which provides that such suits must be brought within five years of the date that the cause of action accrued, and, therefore, the verdict must be for the defendant."

208 To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The plaintiff cannot recover as to the items of alleged damages on shipments between November 1, 1900 and August 1, 1901, because the same are barred by the Federal Statute of Limitations, Section 1047, of the Revised Statutes, and as to such items this suit being instituted for the purpose of recovering a penalty."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The plaintiff cannot recover as items of alleged damages on any of the shipments prior to June 29, 1906, because Section 16 of the Interstate Commerce Act provides that 'claims accrued prior to the passage of this Act may be presented within one year,' and the complaint before the Commission was not presented within one year from the passage of the Act of June 29, 1906, and, therefore, the Interstate Commerce Commission had no jurisdiction over any of the said items for alleged damages prior to June 29, 1906."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Plaintiff cannot recover as to alleged items of damages on shipments prior to July 17, 1905, because Section 16 of the Interstate

Commerce Act provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after,' and this two-year limitation applies to cut off from the jurisdiction of the Commission all the petitioner's shipments made prior to said July 17, 1905, because the complaint before the Commission was not filed within one year from the date of the passage of the Act of June 29, 1906."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The plaintiff cannot recover as to items of alleged damages upon shipments prior to August 28, 1904, because Section 16 of the Interstate Commerce Act provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after,' but with the proviso that claims accrued within two years prior to the passage of the Act of 1906 may be presented within one year."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The plaintiff cannot recover any sums representing items of alleged damages for shipments of coal prior to September 3, 1906, because as to any items of alleged damages for shipments of coal theretofore, they are barred by the Statute of Limitations of Pennsylvania, limiting actions in trespass to matters 'arising within six years from the date of the institution of the suit.'"

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Plaintiff cannot recover as to items of damages on shipments prior to July 17, 1901, because as to any such items he is barred by the Pennsylvania Statute of Limitations applicable to such claims."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

210 "The Jury must disregard anything in the Reports and orders as to the reasonableness of the rates at the time of the Report of June 8, 1911, and thereafter. There is no finding that the rates were unreasonable at any time prior to July 17, 1907, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"It appears on the face of the Reports that the Commission drew conclusions from the evidence before it which conclusions were controlling in the proceedings before the Commission, and were, as a matter of law, incorrect and improper conclusions; said conclusions being (a) the conclusion that there was a discrimination as to shipments from November 1, 1900, to August 1, 1901; and (b) the conclusion as to reasonableness of rates."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

Mr. Warren, of counsel for the defendant, requested the Learned Judge to direct the stenographer to reduce the testimony and Charge to typewriting and file the same of record in the cause, which request was granted and the stenographer so directed.

The Jury rendered a verdict in favor of the plaintiff for \$109,280.17.

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said
211 Court, to the action of the said Court upon the objections made by them on behalf of the defendant and the admission of evidence offered on behalf of the plaintiff as aforesaid, and to the refusal of defendant's points, and inasmuch as the said charge and opinion and the action of the Court as aforesaid so excepted to do not appear upon the record:

The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion and action of the said Court, and requested that the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereafter on the 19th day of December, 1912, the Court entered the following order:

"And now, to wit, this 19th day of December, 1912, it is ordered that defendant's motion for new trial be refused and the judgment be entered on the verdict; and the plaintiff having presented to the Court the record in this case before the Interstate Commerce Commission and upon oral statement in open Court, in the presence of counsel for the defendant as to the services performed before the Interstate Commerce Commission and in this Court;

"Further ordered that counsel for plaintiff be allowed a counsel fee of \$10,000 for their services in the proceedings before the Interstate Commerce Commission, and a further fee of \$10,000 for their services in the proceedings in this Court;

"Further ordered that an exception be granted to the allowance by the Court of a fee to counsel for plaintiff for services in the proceedings before the Interstate Commerce Commission, and also to the allowance of a fee for services in this Court."

And thereafter, on motion of the plaintiff, judgment was
212 entered in favor of the plaintiff and against the defendant in said cause in the sum of \$109,280.17.

And thereupon the aforesaid Judge, at the request of the said counsel for the defendant, did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 30th day of December, A. D. 1912.

JAMES B. HOLLAND. [SEAL.]

Order of Court Refusing New Trial, Etc.

Filed December 19, 1912.

Before Holland, J.

And now, to wit, this 19th day of December, 1912, it is ordered that defendant's motion for new trial be refused and judgment be entered on the verdict; and the plaintiff, having presented to the Court the record in this case before the Interstate Commerce Commission and upon oral statement in open Court, in the presence of counsel for the defendant as to the services performed before the Interstate Commerce Commission and in this Court,

Further ordered that counsel for plaintiff be allowed a counsel fee of Ten Thousand (\$10,000) Dollars for their services in the proceedings before the Interstate Commerce Commission, and a further fee of Ten Thousand (\$10,000) Dollars for their services in the proceedings in this Court;

Further ordered that an exception be granted to the allowance by the Court of a fee to counsel for plaintiffs for services in the proceedings before the Interstate Commerce Commission, and also to the allowance of a fee for services in this Court.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

213

Præcipe for Judgment.

Filed December 19, 1912.

To the Clerk of the Said Court:

Enter judgment in favor of plaintiff and against defendant in the sum of One Hundred and Nine Thousand Two Hundred and Eighty Dollars and Seventeen Cents, as per verdict of the jury.

WM. A. GLASGOW, JR.,
Attorney for Plaintiff.

Judgment.

Before Holland, J.

And now, this 19th day of December, 1912, in accordance with præcipe filed, judgment is hereby entered on the record in the above case, in favor of the plaintiff and against the defendant, in the sum of \$109,280.17.

LEO A. LILLY,
Deputy Clerk.

Petition for Writ of Error.

Filed December 30, 1912.

The Lehigh Valley Railroad Company, the defendant in the above entitled cause, being aggrieved by the final judgment made and entered by the Court in the above entitled cause, on the 19th day of December, A. D. 1912, wherein it was adjudged that the plaintiff shall recover therein against the defendant the sum of \$109,280.17, with interest from the 12th day of November, 1912,

214 and that counsel for the plaintiff shall receive from the defendant as counsel fee for their services before the Interstate Commerce Commission in the proceeding before that Commission entitled Henry E. Meeker and Caroline Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180, the sum of \$10,000, and as further counsel fee for their services before the United States District Court for the Eastern District of Pennsylvania, in this cause the sum of \$10,000, comes now by its attorneys, Everett Warren, Frank H. Platt, Edgar H. Boles and John G. Johnson, and petitions the Court for an order allowing said defendant to prosecute a writ of error from the said judgment to the Circuit Court of Appeals of the United States for the Third Circuit, in accordance with the laws of the United States in such case made and provided; and also that an order be made fixing the amount of security which defendant shall furnish upon such writ of error, and that upon giving such security all further proceedings of this Court shall be stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray, etc.

EVERETT WARREN,
FRANK H. PLATT,
EDGAR H. BOLES,
JOHN G. JOHNSON.

Attorneys for Petitioner,

Per J. W. BAYARD.

Dec. 27, 1912.

Order of Court.

Filed December 30, 1912.

Before Holland, J.

And now, December 30th, 1912, on motion of Everett Warren, Frank H. Platt, Edgar H. Boles and John G. Johnson, attorneys for defendant,

215 It is ordered that a writ of error to the United States Circuit Court of Appeals for the Third Circuit from the final judgment heretofore filed and entered in the above entitled cause be and the same is hereby allowed, and that a certified transcript of

the record and of the proceedings herein be forthwith transmitted to the said Court.

And it is further ordered that the bond for damages and costs in said appeal be and the same is hereby fixed at \$218,560.34.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Assignments of Error.

Filed Dec. 30, 1912.

And now comes the defendant, Lehigh Valley Railroad Company, and files the following Assignments of Error, upon which it will rely upon its prosecution of the Writ of Error in the above-entitled case:

1. The learned trial Judge erred in admitting in evidence the report of the Interstate Commerce Commission, dated June 8, 1911, in the proceeding before that Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 107.)

2. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated June 8, 1911, in the proceeding before that Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 107.)

216 3. The learned trial Judge erred in admitting in evidence the report of the Interstate Commerce Commission, dated May 7, 1912, in the proceeding before that Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 115.)

4. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated May 7, 1912, in the proceeding before that Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 116.)

5. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated June 15, 1912, in the proceeding before that Commission entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 116.)

6. The learned trial Judge erred in admitting the following testimony of witness Henry E. Meeker:

"On that occasion I asked Mr. Taylor if the new rate to the independent operators of 65% became operative, if we would get the 35% rate, and he said 'of course.' He said I would get the same as all. We were talking about the same as everybody else was getting at that time." (Record, p. 85.) "Q. Can you state to the jury when the arrangement or agreement by which the average adjust

ment of rates on the 65% basis instead of 60 was made effective by the Lehigh Valley Railroad Company? A. August 1, 1901. Q. For what period of time did it then apply, the 65% basis. A. From November 1, 1900, to August 1, 1901." (Record, p. 129.) "Q.

Can you tell the Court and jury what amount you paid to the Lehigh Valley Railroad Company during the period from November
217 1st, 1900, to August 1st, 1901, on shipments of coal from the Wyoming region to Perth Amboy? A. \$129,989.18."

(Record, p. 88.) "Q. Can you tell me what was the amount you would have paid on the same coal covering that period if you had been charged on the basis of 35% of the average selling price at Perth Amboy of coal sold by the Lehigh Valley Coal Company? A. \$118,979.85. Q. What is the difference between the amount you paid and the amount you would have paid on the basis of the question immediately preceding? A. \$11,009.33." (Record, p. 91.)

7. The learned trial Judge erred in admitting in evidence the testimony of witness Henry E. Meeker, as follows:

"Q. Have you calculated what would be the difference between the amounts which you paid and the amounts which would have been paid if you had been charged \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat? A. Yes. Q. Will you please state what it is? A. \$58,236.45." (Record, p. 120.)

8. The learned trial Judge erred in charging the jury as follows.

"The plaintiff in this case, Henry E. Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, vs. The Lehigh Valley Railroad Company, instituted suit here upon two reports made by the Interstate Commerce Commission." (Record, p. 193.)

9. The learned trial Judge erred in charging the jury as follows:

"This suit is based, Gentlemen of the Jury, upon those re-
218 ports and upon the amounts which the reports show were awarded by the Commission against the defendant in favor of the plaintiff." (Record, p. 193.)

10. The learned trial Judge erred in charging the jury as follows:

"This suit is brought to recover on an award made by the Interstate Commerce Commission to this plaintiff against the Lehigh Valley Railroad Company, as reparation for the collection of freights which, it was claimed, was in violation of the Interstate Commerce Act." (Record, p. 193.)

11. The learned trial Judge erred in charging the jury as follows.

"And the Commission, according to the report offered in evidence here, investigated that question and they found, according to that report, that the rates on coal, as scheduled on its tariff and charged to all shippers from the Wyoming region to Perth Amboy over this Railroad, were too high. That \$1.55 for prepared sizes, \$1.40 for pea coal and \$1.20 for buckwheat was too high, and that it was unreasonable, and that the Railroad Company only should have charged \$1.40 for prepared sizes, \$1.30 for pea coal and \$1.15 for buckwheat, and, therefore, taking into consideration the number of tons that this plaintiff shipped during the period from August 1, 1901, to

July 17, 1907, that the plaintiff had been damaged in the sum of \$58,236.45." (Record, p. 194.)

12. The learned trial Judge erred in charging the jury as follows:

"That is the claim, Gentlemen of the Jury, and, as I have said, it is based upon the reports of the Interstate Commerce Commission."
(Record, p. 195.)

219 13. The learned trial Judge erred in charging the jury as follows:

"The plaintiff had a right to go before the Interstate Commerce Commission and I instruct you that in this case the Interstate Commerce Commission had a right to act. They had a right to act in this case." (Record p. 195.)

14. The learned trial Judge erred in charging the jury as follows:

"It is objected here, Gentlemen of the Jury, that these reports made by the Commission, upon which this suit is based, are not in accordance with the requirements of this Act and, therefore, you should find for the defendant. But I instruct you, Gentlemen of the Jury, that they are, in the judgment of the Court, in accordance with the requirements of this Section. They state the conclusions as required by the Act and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient finding of fact to sustain this suit."
(Record p. 196.)

15. The learned trial Judge erred in charging the jury as follows:

"In the presentation of this claim to the Court and the jury, the Act of Congress gives the Report a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a jury for the purpose of ascertaining whether or not
220 it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution." (Record p. 197.)

16. The learned trial Judge erred in charging the jury as follows:

"But in that proceeding the suit is on the report of the findings of the Interstate Commerce Commission and their finding is made prima facie evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award and that it has not been paid, and that makes its prima facie case of its right to claim." (Record p. 197.)

17. The learned trial Judge erred in charging the jury as follows:

"But, if it (defendant) does not see fit to do so, then the report of the Commission is prima facie evidence of its correctness and, when not paid, entitles the plaintiff, in the absence of any controlling cir-

cumstances or evidence to the contrary, to judgment before a jury for the amount of his claim." (Record p. 197.)

18. The learned trial Judge erred in charging the jury as follows:
 "So that the only evidence before you is the *prima facie* evidence of these claims and, unless there is something in the circumstances which would, in your judgment, contradict the *prima facie* effect which this evidence is given by law, it would be your duty to find in favor of the plaintiff for the amount which he claims." (Record p. 198.)

19. The learned trial Judge erred in charging the jury as follows:
 "Now, Gentlemen of the Jury, the question of the Statute of Limitations has been raised here, but I instruct you that you will have nothing to do with the question of the Statute of Limitations. The matter of its application is not a matter of fact, but it is a matter of law to be considered by the Court, and, for the present, the Court instructs you that there is no Statute of Limitations which bars the recovery of the plaintiff for either of the amounts presented in this suit, and that, if you take the evidence which is made *prima facie* by the Act of Congress as conclusive of the claim, it will be your duty to render a verdict in favor of the plaintiff for the full amount for both." (Record p. 198.)

20. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"Upon the whole case, the verdict must be for the defendant." (Record p. 202.)

21. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The order and reports on which the petitioner relies, both for the establishment of his case in this Court and for the jurisdiction of this Court in this action, are invalid, unconstitutional and void, in that they deprive the defendant of due process of law, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and, therefore, the verdict must be for the defendant." (Record p. 203.)

22. The learned trial Judge erred in refusing to charge the jury as requested by the defendant, in the points submitted by it, as follows:

"The order and findings of the Commission were invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury. The order and findings assume to take from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case; and further, in effect, impose

upon this Court, as evidence in this case, that which is not legal evidence; and, further, to impose upon this Court as findings of the Commission, conclusions not based on findings, and therefore the verdict must be for the defendant." (Record p. 203.)

23. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"The order and findings upon which the plaintiff's case rests are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation at that time; it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make
223 findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated; the power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore, the verdict must be for the defendant." (Record p. 203.)

24. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"The award made in the reparation order is not based on the findings of fact required by the Act, as the Act requires that, in case damages are awarded, such reports shall include the findings of fact on which the award is made; and the report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff prior to July 17, 1907, were unreasonable, and, therefore, the verdict must be for the defendant." (Record p. 204.)

25. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"It appears on the face of the order and in the report that the total amount awarded by the Interstate Commerce Commission was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907, and
224 that each such shipment was the basis of a separate cause of action. There was no finding by the Commission as to the several amounts due upon the several causes of action, and, therefore, the verdict should be for the defendant." (Record, p. 204.)

26. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no evidence before the Court of any discrimination on the part of the defendant, as charged in the petition, from November 1, 1900, to August 1, 1901, and the alleged causes of action

referred to in Paragraph III of the petition, as having arisen through acts of discrimination on the part of the defendant, occurring from November 1, 1900, to August 1, 1901, have not been proved and are not sustained by the findings of the Commission, or by any evidence before this Court, and, therefore, the petitioner cannot recover upon any of the alleged items of damage for shipments prior to August 1, 1901." (Record p. 205.)

27. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no evidence showing, or tending to show, that the petitioner was in any way damaged, or could have been damaged, by the alleged acts of discrimination charged to have been performed by the defendant between November 1, 1900, and August 1, 1901, and, therefore, the petitioner cannot recover upon any of the alleged items of damages for shipments prior to August 1, 1901." (Record p. 205.)

225 28. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence in this case, either by way of findings or statements or evidence of any kind, that the rates charged by the defendant railroad for transporting coal to Perth Amboy, from August 1, 1901, to July 17, 1907, were unreasonable, unjust or excessive, and, therefore, the petitioner cannot recover for any of the items of damage for shipments between August 1, 1901, and July 17, 1907." (Record, p. 206.)

29. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence, either by way of findings or statements or any other evidence in this case, that the petitioner was in any way damaged by the alleged imposition of unreasonable rates on the part of the railroad, between August 1, 1901, and July 17, 1907, and, therefore, the petitioner cannot recover for items of damages on shipments between August 1, 1901, and July 17, 1907." (Record p. 206.)

30. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence, either by way of findings or statements, or any other evidence in this case, that the reduced rates on which the amount of the alleged reparation is computed, were at any time between August 1, 1901, and July 17, 1907, reasonable or duly compensatory, and, therefore, the petitioner cannot recover on any of the items of damages for shipments between August 1, 1901, and July 17, 1907." (Record p. 206.)

226 31. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The order and findings do not show that petitioner has been in-

jured. On the contrary, they show that the award of reparation to him is a discrimination in his favor against other shippers, and a judgment in his favor would constitute such discrimination; therefore, the verdict should be for the defendant." (Record p. 206.)

32. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"Inasmuch as it appears that petitioner was charged and paid the correct tariff rates, according to tariffs duly filed pursuant to Section 6 of the Act, therefore, petitioner cannot recover back any part of the freights so paid to the railroad; and, therefore, the verdict should be for the defendant." (Record p. 207.)

33. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The order and reports upon which petitioner rests his case are invalid and void, because in the proceedings before the Commission, the Commission failed to give to the defendant railroad the hearing provided for in the Interstate Commerce Act, which said hearing, the Act provides, shall be a condition precedent to the making of any valid order or findings, and, therefore, the verdict should be for the defendant." (Record p. 207.)

34. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

227 "Since the suit is for the recovery of penalties for alleged violations of the Act to Regulate Commerce, recovery is barred by the Federal Statute of Limitations, Section 1047 of the Revised Statutes, which provides that such suits must be brought within five years of the date that the cause of action accrued, and, therefore, the verdict must be for the defendant." (Record p. 207.)

35. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The plaintiff cannot recover as to the items of alleged damages on shipments between November 1, 1900, and August 1, 1901, because the same are barred by the Federal Statute of Limitations, Section 1047, of the Revised Statutes, and as to such items this suit being instituted for the purpose of recovering a penalty." (Record p. 208.)

36. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The plaintiff cannot recover as items of alleged damages on any of the shipments prior to June 29, 1906, because Section 16 of the Interstate Commerce Act provides that 'claims accrued prior to the passage of this Act may be presented within one year,' and the complaint before the Commission was not presented within one year from the passage of the Act of June 29, 1906, and, therefore, the Interstate Commerce Commission had no jurisdiction over any of

the said items for alleged damages prior to June 29, 1906." (Record p. 208.)

37. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

228 "Plaintiff cannot recover as to alleged items of damages on shipments prior to July 17, 1905, because Section 16 of the Interstate Commerce Act provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after,' and this two-year limitation applies to cut off from the jurisdiction of the Commission all the petitioner's shipments made prior to said July 17, 1905, because the complaint before the Commission was not filed within one year from the date of the passage of the Act of June 29, 1906." (Record p. 206.)

38. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The plaintiff cannot recover as to items of alleged damages upon shipments prior to August 28, 1904, because Section 16 of the Interstate Commerce Act provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after,' but with the proviso that claims accrued within two years prior to the passage of the Act of 1906 may be presented within one year." (Record p. 207.)

39. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The plaintiff cannot recover any sum representing items of alleged damages for shipments of coal prior to September 3, 1906, because as to any items of alleged damages for shipments of coal theretofore, they are barred by the Statute of Limitations of Pennsylvania, limiting actions in trespass to matters 'arising within
229 six years from the date of the institution of the suit.'" (Record p. 209.)

40. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"Plaintiff cannot recover as to items of damages on shipments prior to July 17, 1901, because as to any such items he is barred by the Pennsylvania Statute of Limitations applicable to such claims." (Record p. 209.)

41. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The jury must disregard anything in the reports and orders as to the reasonableness of the rates at the time of the report of June 8, 1911, and thereafter. There is no finding that the rates were unreasonable at any time prior to July 17, 1907, and, therefore, the verdict must be for the defendant." (Record, p. 210.)

42. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"It appears on the face of the reports that the Commission drew conclusions from the evidence before it, which conclusions were controlling in the proceedings before the Commission, and were, as a matter of law, incorrect and improper conclusions; said conclusions being (a) the conclusions that there was a discrimination as to shipments from November 1, 1900, to August 1, 1901; and, (b) the conclusion as to reasonableness of rates." (Record p. 210.)

230 43. The learned trial Judge erred in allowing counsel for the plaintiffs a fee of \$10,000 for their services to the plaintiffs in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record p. 211.)

44. The learned trial Judge erred in allowing counsel for the plaintiffs a fee of \$10,000 for their services to the plaintiffs in this case. (Record p. 211.)

45. The learned trial Judge erred in entering judgment for the plaintiffs upon the verdict. (Record p. 211.)

EVERETT WARREN,
FRANK H. PLATT,
EDGAR H. BOLES,
JOHN G. JOHNSON,

Attorneys for Defendant,

Per J. W. BAYARD.

Stipulation for Record on Writ of Error.

Filed Dec. 30, 1912.

And now, this 27th day of December, 1912, it is stipulated and agreed that the record sent to the Circuit Court of Appeals on the writ of error allowed in the above entitled cause shall contain:

1. Docket Entries;
 2. Petitioner's statement of claim, with the exhibits attached thereto;
 3. Defendant's plea;
 4. Bill of Exceptions; except the exhibits attached to plaintiff's statement of claim and printed with it;
 - 231 5. Petition for writ of error and order thereon;
 6. Specifications of error;
 7. Bond sur writ of error;
- and no other papers.

WM. A. GLASGOW, JR.,
Attorney for Plaintiff.

EVERETT WARREN,
FRANK H. PLATT,
EDGAR H. BOLES,
JOHN G. JOHNSON,

Attorneys for Defendant.

Per J. W. BAYARD.

Bond Sur Writ of Error.

Filed Dec. 30, 1912.

Know all men by these presents, That we, Lehigh Valley Railroad Company, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Henry Eugene Meeker, surviving partner of the firm of Henry E. Meeker and Carolina H. Meeker, doing business under the trade name of Meeker and Company in the full and just sum of Two hundred and eighteen Thousand five hundred and sixty dollars and thirty-four cents, to be paid to the said Henry Eugene Meeker surviving partner as aforesaid his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 28th day of December in the year of our Lord one thousand nine hundred and twelve (1912).

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania in a suit depending in said

232 Court between the said Henry Eugene Meeker, surviving partner as aforesaid, plaintiff and the Lehigh Valley Railroad Company, defendant, on the 19th day of December, 1912, to September Sessions, 1912, No. 2146, a judgment was rendered against the said defendant in the sum of One hundred and nine thousand two hundred and eighty dollars and seventeen cents in favor of said plaintiff and the said defendant having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the city of Philadelphia, within thirty days.

Now, the condition of the above obligation is such, that if the said Lehigh Valley Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of:

LEHIGH VALLEY RAILROAD COMPANY,

By E. B. THOMAS, *President.*

Attest: D. E. BAIRD, *Secretary.* [SEAL.]

UNITED STATES FIDELITY AND GUARANTY CO.,

By HENRY STRAUSS,

Resident Vice-President.

Attest: S. LEO HUNT,

Resident Secretary. [SEAL.]

Before Holland, J.

Approved by the Court:

Attest: GEORGE BRODBECK, *Deputy Clerk.*

233 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of Plea and Proceedings in the case of Henry E. Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company v. Lehigh Valley Railroad Company, No. 2146, September Session, 1912, a per præcipe filed, a copy of which is hereto attached, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia this 30th day of January, in the year of our Lord one thousand nine hundred and thirteen, and in the one hundred and thirty-seventh year of the Independence of the United States.

[SEAL.]

WM. W. CRAIG,
Clerk District Court U. S.

234 *Certified Copy of Proceedings in Circuit Court of Appeals in
 No. 1721.*

[Seal United States Circuit Court of Appeals, Third Circuit.]

235 In the United States Circuit Court of Appeals for the Third
 Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD CO., Plaintiff in Error,
 vs.
 MEEKER & COMPANY, Defendant in Error.

And afterwards, to wit, on the second and third days of April 1913, come the parties aforesaid by their counsel aforesaid, and the case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John L. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof;

And afterwards, to wit, on the twenty seventh day of August 1913, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

236 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington, and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

On September 3, 1912, Henry E. Meeker, surviving partner of the firm of Meeker & Company, defendant in error (hereinafter called the plaintiff), instituted in the court below, under the
237 provisions of section 16 of the Act to Regulate Commerce, a suit against the Lehigh Valley Railroad Company, plaintiff in error (hereinafter called the defendant), to recover damages alleged to have been incurred by reason of certain acts and practices of the defendant, in violation of said act, and therefore the subject of complaint by the said plaintiff before the Interstate Commerce Commission.

To the judgment obtained by the plaintiff against the defendant, this writ of error has been sued out by the latter.

In his petition in the court below, "setting forth briefly the causes for which he claims damages," plaintiff charges that the defendant company, as a common carrier, subject to the provisions of the Interstate Commerce Act, from November 1, 1900, to August 1, 1901, discriminated against his firm, in that it demanded and received from Meeker & Company greater compensation for services rendered in the transportation of anthracite coal, from the Wyoming region in Pennsylvania, to Perth Amboy, in New Jersey, than it demanded or received from another shipper for "a like and contemporaneous service in the transportation" of anthracite coal between the same points, in violation of section 2 of the Act to Regulate Commerce; and further charges that from August 1, 1901, to July 17, 1907, the

defendant company demanded and received from plaintiff's firm unjust and unreasonable rates for the transportation of anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy New Jersey, in violation of said act.

In support of this charge, it is alleged in the petition, as follows: That defendant is a common carrier engaged in interstate railroad transportation between points in the states of Pennsylvania, New Jersey and New York, and is largely engaged in transporting anthracite coal for plaintiff and other shippers over its lines,

238 from collieries in the Wyoming coal region of Pennsylvania. to Perth Amboy, in the state of New Jersey; that one of said shippers other than plaintiff is the Lehigh Valley Coal Company, a corporation of the state of Pennsylvania, engaged in the business of mining and buying anthracite coal in said Wyoming region.

Plaintiff alleges that from November 1, 1900, to August 1, 1901, the defendant company, intending to unjustly and unreasonably discriminate in favor of, and to prefer, the Lehigh Valley Coal Company to the plaintiff and other independent shippers, unlawfully charged the plaintiff with excessive and discriminatory rates on 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, shipped between the said Wyoming coal region and Perth Amboy, New Jersey, the total charges on such coal amounting to \$129,989.18, whereas, had the plaintiff been given the benefit of the rates charged by defendant for similar shipments of the said Lehigh Valley Coal Company, the total charge upon plaintiff's said shipments would have been \$11,909.33 less than the sum exacted as above during the period aforesaid, which sum, with interest thereon from August 1, 1901, was awarded by the Interstate Commerce Commission in favor of the plaintiff, in their supplemental report dated May 7, 1912, as also in their orders supplemental thereto, issued June 8 and 15, 1912, attached to said petition and marked Exhibits "A" and "B." respectively.

Plaintiff further alleges that from August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner, over its said line of road from the Wyoming coal region, aforesaid, to Perth Amboy, at tide water in New Jersey, the following unreasonable and excessive charges upon all shipments of anthracite coal, to wit:

239 \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 per ton for coal smaller than buckwheat coal. That from August 1, 1901, to July 1, 1907, these shipments amounted to 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and that the charges paid thereon amounted to \$685,375.27, at rates exceeding \$1.40 per gross ton in prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat coal, the rates fixed by the Interstate Commerce Commission as proper and reasonable, the amount of such excess being \$58,236.45, paid by plaintiff to the defendant. That said payments were made under protest that the same were unreasonable and excessive.

The petition then recites that on July 17, 1907, plaintiff filed with the Interstate Commerce Commission a complaint, setting forth the aforesaid unreasonable and discriminatory practices and charges of defendant, to the prejudice of the plaintiff and in violation of the Act to Regulate Commerce, and praying for a hearing upon the allegations set forth in said complaint, and that the commission make an order, requiring the defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line, from the Wyoming region to tidewater at Perth Amboy, and awarding complainants reparation in damages in such amount as they might have suffered loss by reason of said improper practices and charges. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the complaint regularly heard and argued by all the parties thereto, and submitted. A report was duly filed by the said commission on June 8, 1911, in Docket No. 1180, a copy of which report, with the conclusions and orders of the commission, is attached to plaintiff's petition as "Exhibit C."

240 By this report the Interstate Commerce Commission held that the charges by the defendant company to the plaintiff, between November 1, 1900, and August 1, 1901, were discriminatory, and therefore unlawful, and also that the charges of defendant company, between August 1, 1901, and July 1, 1907, were unreasonable, and the same were ordered to be discontinued, and that reasonable and proper charges for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid, should thereafter be \$1.40 per gross ton on prepared sizes, instead of \$1.55, the rate charged, and \$1.30 on pea coal, instead of \$1.40, the rate charged, and \$1.15 on buckwheat coal, instead of \$1.20, the rate charged, and the commission held "that reparation should be awarded upon the basis of the rates herein found to be reasonable, upon all shipments of coal by complainants from the Wyoming region to Perth Amboy, since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants."

Plaintiff's petition further recites that a hearing was had upon the question of reparation, and that a supplemental report was filed by said commission May 7, 1912. In this report, attached to the petition and marked "Exhibit A," the commission state "that the original report in No. 1180 disposed of all the questions at issue, except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature. A further hearing has been held, and complainant has presented exhibits, showing the total number of tons of each variety of
241 coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct."

They then refer to their finding in the original report, that the

rates exacted by defendant from November 1, 1900, to August 1, 1901, were unjustly discriminatory and in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and the defendant, and to the further finding in said original report, that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes \$1.30 on pea, and \$1.15 on buckwheat.

They then proceed to say that on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, they now find that during the period from November 1, 1900, to August 1, 1901, in regard to the charges exacted from plaintiff and found to have been unjustly discriminatory, that complainant was entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. And they further find, in regard to the rates exacted for coal shipped by plaintiff from August 1, 1901, to July 7, 1907, which were found unreasonable in the original report, that plaintiff is "entitled to an additional award of reparation in the sum of \$58,236.45 with interest amounting to \$27750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45, from September 1, 1911."

Following said supplemental report, and on the same day, to wit May 7, 1912, a so-called supplemental order was entered, which, as amended in an unimportant particular May 15, 1912, read as follows:

242 "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company on or before the 15th day of July, 1912, the sum of \$11,009.33 with interest thereon at the rate of 6 per cent. per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region, in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the commission.

"It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker &

Company, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent. per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania, 243 to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unreasonable, as more fully and at large appears in and by said report of the commission."

The petition then avers that a true copy of this order of the commission was duly served upon the defendant, and demand made for payment of the sum claimed in the petition, and as set forth in the aforesaid orders of the commission and attached to the petition as Exhibits "A" and "B," but the defendant had failed and refused to pay the said sums, or any part thereof. "Wherefore," it is alleged, "petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce." (The theory of the petition thus appears to be that this is a proceeding to enforce the order of reparation made by the commission, and not a suit for the recovery of such damages as plaintiff has actually incurred by reason of the alleged unlawful acts of defendant, as found by the commission.) The court is then prayed to enter a rule upon said defendant to file a plea, answer, or demurrer to the petition within thirty days from the date of serving a copy of the same, and to fix a time and place for the trial of the cause under the provisions of the Act to Regulate Commerce.

The defendant accordingly filed, October 5, 1912, its plea of the general issue, the bar of the statutes of limitation applicable to plaintiff's claim, and for a further plea averred that the Interstate Commerce Commission had no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce, and that there was before the commission no substantial evidence to sustain its findings and order.

At the trial, the plaintiff put in evidence the report of the commission, dated June 8, 1911 (see Record, pp. 22-73), and the 244 order thereon of the same date, requiring the defendant to abstain from charging or receiving its present rates for the transportation of coal so found to be unreasonable, and requiring defendant for a period of two years thereafter to maintain the rates found in said report to be reasonable. Also, the supplemental report of the commission, dated May 7, 1912, finding the reparation or damages to which the plaintiff was entitled, and the supplemental order of that date, amended by that of June 15, as hereinbefore set out, requiring the defendant to pay to plaintiff, on or before the first day of August, 1912, the sums found due as and for reparation in said supplemental report.

Save the testimony of the plaintiff (Meeker), bearing upon the

charge of discrimination as to freight rates between November 1, 1900, and August 1, 1901, no evidence, other than these four papers was offered by plaintiff at the trial. The defendant offered no testimony, except that of Mr. George W. Field, one of its counsel, who attended the hearing before the Interstate Commerce Commission and made certain calculations from Exhibits "A" and "B," offered in evidence by defendant, dividing up the shipments therein set out between different dates, to which the different statutes of limitation might apply. Plaintiff's contention was and is, that these four papers, in the absence of any evidence on the part of the defendant, made out a prima facie case in his favor and entitled him to a recovery, as damages, of the amounts awarded by the commission.

This was the view taken by the learned judge of the court below, in submitting the case to the jury, and a verdict was accordingly rendered in favor of the plaintiff for the aggregate sums awarded by the commission, as reparation, which, with interest thereon, amounted to \$109,280.17. To the judgment thereon, this
245 writ of error is sued out by the defendant. Certain of the assignments challenge the constitutionality of section 16 of the Act to Regulate Commerce, on the ground that its provision, that the findings and order of the commission shall be prima facie evidence of the facts therein stated, is unconstitutional, in that it confers judicial power upon an administrative commission, deprives the defendant of its property without due process of law, and denies to it its right of trial by jury; and also, on the ground that the provision of said section, conferring upon the commission authority to determine and award damages to any party complaining of the violation of the act by a common carrier and to direct such carrier to pay to the complainant before a day named the sum so awarded, and declaring that, on a trial of a suit to recover such damages, the facts stated in the findings and order of the commission shall be prima facie evidence of the facts therein stated, is not a proper exercise of the powers given to Congress to regulate commerce. The latter point was raised before this court in the case of *Western New York & P. R. Co. vs. Penn Refining Co.*, 70 C. C. A. 23. We there said:

"The constitutionality of the provisions making findings of fact prima facie evidence before a jury, has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guaranty relative to trial by jury in the courts of the United States, does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision, counsel for the plaintiff in error does not attempt a reargument of the question before this court. The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute. The questions
246 raised by the assignments of error which are most material, relate to the submission of the reports and orders of the Interstate Commerce Commission, and to how far and in what respect the

same are to be taken as prima facie evidence of facts stated by them. Also, the question whether the facts of which such reports and orders are the prima facie evidence, are sufficient, in the absence of countervailing testimony by the defendant, to maintain the plaintiff's suit and claim for damages.

This court has already, in a decision at this term, in the case of Lehigh Valley Railroad Co. et al. vs. J. Mitchell Clark, et al., discussed at some length the history of the legislation embodied in the Act to Regulate Commerce, and its amendments. As we there pointed out, section 14 of the original act made it the duty of the commission to make a report in writing, which should include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 16 provided for the refusal or neglect "to obey any lawful order or requirement of the commission, by authorizing the commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States, sitting in equity, and empower such court, as a court of equity, to hear and determine the matter, etc. And on such hearing, the report of said commission shall be prima facie evidence of the matters therein stated. And it was provided that if it be made to appear to the court "that the lawful order or requirement of said commission,

drawn in question, has been violated or disobeyed," the court
247 may issue "a writ of injunction, or other proper process, mandatory or otherwise, to restrain the common carrier from further violation or disobedience of such order."

From the fact that it was to a court of equity alone that resort was to be had for the enforcement of an order of the commission, it was apparent that it was only to such ministerial orders of the commission as could be enforced by a court of equity, that the act in this respect could apply, and that a recommendation or an award of damages by the commission was not such an order or requirement as could be thus enforced without a violation of the seventh amendment to the Constitution, in regard to jury trials. This consideration suggested the Act of March 2, 1889, amending section 16 of the original act by adding thereto the following:

"If the matters involved in such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the Constitution of the United States, and any such common carrier shall violate or refuse, or neglect to obey or perform the same, after notice, etc., * * * it shall be lawful for any company or person interested * * * to apply in a summary way, by petition, to the Circuit Court of the United States, sitting as a court of law, * * * alleging such violation or disobedience as the case may be."

Then, after providing for a jury trial, the amendment concludes: "At the trial, the findings of fact of said commission, as set forth

in its report, shall be prima facie evidence of the matters therein stated."

The distinction thus clearly made between reparation and non-reparation cases, is made still more clear in the so-called "Hepburn" Act of 1906, in which section 14 was amended so as to read, as follows:

248 "That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

This distinction was still further emphasized by so amending section 16 as to provide that, where, after hearing on a complaint, the commission should determine that complainant is entitled to an award of damages, it

"shall make an order, directing the carrier to pay to the complainant the sum to which he is entitled, on or before the day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file in the Circuit Court of the United States for the district in which he resides, * * * a petition, setting forth, briefly, the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that, on the trial of such suit, the findings and order of the commission shall be prima facie evidence of the facts therein stated."

After other provisions, the section, as amended, further provides (the italics being ours):

"If any carrier fails or neglects to obey any order of the commission, *other than for the payment of money*, and while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, * * * for an enforcement of such order. Such application shall be by petition, which shall

249 state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise."

Thus, the inherent and obvious distinction between reparation and non-reparation cases is clearly recognized by Congress. It could hardly be otherwise than that such recognition should be made. The great purposes of the act are largely accomplished by the ad-

ministrative control given to the Commerce Commission over all carriers, as to Interstate Commerce, and that administrative control is made efficient by the peculiar jurisdiction of a court of equity, to which the commission or a party interested may apply for the enforcement of its orders. In such cases, the whole record of the investigation by the commission is before the court, and the only matter to be determined is that the order made by the commission is a lawful order; that is, made within the scope of the authority conferred by Congress, and upon a full hearing of the parties, with the opportunity accorded of adducing testimony and having it considered. (*I. C. C. et al. vs. Louisville & Nashville R. R. Co.*, lately decided by the Supreme Court of the United States and not yet reported.)

When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the commission as an administrative body, and of enforcing its
 250 proper control over Interstate Commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a quasi public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the kind are determined, by a jury trial at common law.

The right to a jury trial having thus been preserved by the provisions of the act above referred to, under them "the parties are entitled," as said by us in *Western New York & P. R. R. Co. vs. Penn Refining Co.* (*supra*) "to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards, furnished by a proper application of the principles of evidence and the proper submission of the case to the jury." This right of trial by jury is not granted, as of grace, by the act, but is a constitutional right of which the defendant cannot be deprived. The consistency and harmony of the reparation proceedings as authorized by the act, with the administrative features thereof, are, however, as pointed out by the Supreme Court in *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, maintained, by Congress having made, in the exercise of its legislative power as to the law of evidence, the "findings and order of the commission prima facie evidence of the facts therein stated." In all other respects, a suit under the act shall proceed "like all other civil suits for damages." We cannot give less than full meaning and effect to
 this language. What may be the facts, or classes of facts, to
 251 which this provision of the act applies, must be the important question in this, as in other cases, for the determination of the court. As under the decision in the *Abilene* case, the literal language of the act, in allowing a complainant as to all matters, to bring an independent common law action for damages, cannot be

reconciled with the general scope of the act, or with other particular provisions thereof, a suit for damages must in all cases calling for an exercise of the discretion of the administrative and rate-regulating body, be founded upon a previous application to and investigation by the Commerce Commission, and instituted with reference to "rights recognized in or to duties imposed by the act." We think, therefore, it clearly follows from the premises:

(1) That the finding of the commission as to the reasonableness, or otherwise, of the rate charged by the carrier in Interstate Commerce, is an administrative function properly and constitutionally delegated by the legislative power to the commission, and is, if lawfully made, conclusive upon a court of equity, in which it is sought to enforce an order founded upon the same. In the language of Mr. Justice Lamar, in *I. C. C. vs. Union Pac. R. R. Co.*, 222 U. S. 541, "there was, then, under the statute nothing for the companies to do, except to comply with the order." The lawfulness of such finding is subject to judicial inquiry only in the respects above referred to.

(2) Assuming, but not deciding, that such finding is not only an administrative conclusion by the commission, which can be enforced as such by a court of equity, but also a finding of fact having evidential value in a suit for damages, it is only *prima facie* evidence of such fact, and not conclusive, as it would be in a suit in equity to enforce the fixing of a reasonable rate.

252 (3) The finding by the commission that a given rate is unreasonable, while pertinent to the issue, is not necessarily decisive of the question of liability in such a case as the present, either *prima facie* or otherwise. No argument is needed to show that the liability of the defendant, in damages, cannot be established by the mere finding or award of the commission in regard to the same. If it could be, of course all distinction between reparation and non-reparation cases, so carefully made in the statute, would be nugatory, and the value of the common law trial, secured by the seventh amendment, be destroyed.

The pertinency and evidential weight and value of the facts, as to which the findings and order are *prima facie* evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a *prima facie* case for the plaintiff. The importance of the exceptional privilege thus conferred upon the plaintiff, of not being required to prove, in the first instance, the facts found by the commission, makes it the more necessary that the court should point out to the jury what are and what are not such findings. The imperative command of section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the commission, with reference to their proposed use in a jury trial, and evidently with this understanding, the original rule of the commission was made, that "upon the final submission of the case to the commission, either party may submit proposed findings of fact for the consideration of the commission,

which findings must embrace only the material facts of the case supposed to be established by the testimony."

No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the commission, what were properly to be considered such findings. We can only reiterate what was said by us in the Penn Refining Company case (*supra*):

"While not expressing the opinion that findings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be disregarded. Unless this course be pursued, the parties are deprived, at least in part, of the benefits and safeguards intended to be secured to them under the constitutional guaranty of a trial by jury."

It will be remembered that the only evidence adduced by the plaintiff in support of his claim for damages at the trial, consisted of the four documents to which we have above referred, viz:

(1) The original report of the commission, dated June 8, 1911, occupies fifty printed pages of the record. In this report, the commission find that the complainants have sustained the allegation of unjust discrimination under the second section of the act, and that reparation, with interest from August 1, 1901, will be awarded on this account. At the close of their report, they find, as follows:

"After careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits, respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy
* * * are unreasonable so far as they exceed"

a certain amount. (This finding, as defendant contends, is not a finding that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, but that the then present rates, as they existed at the date of the report, were unreasonable.) The opinion is then expressed that reparation should be awarded upon the basis of the rates found in said report to be reasonable.

(2) This report is followed by an order of the same date, commanding the defendant "to desist, on or before the 15th day of August, 1911, and for a period of two years thereafter, from charging or demanding its present rates, and that defendant be required to establish, on or before said date, and maintain for a period of two years thereafter, rates not in excess" of the rates therein specified.

(3) A supplemental report, made by the commission, May 7, 1912, which states that the original report disposed of all the questions at issue, except the claim for reparation, and that the case was held open for further information regarding that feature. It then states that a further hearing had been held and complainant had presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on the amount of such shipments. They then say that in their original report they

had found that the rates charged complainant for transportation of coal during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory to an extent named, and that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, so far as they exceeded rates established as reasonable by the commission. This latter reference to the original report is, as claimed by the defendant, inaccurate. They then say that, on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation (which is nowhere set out), they find, first, 255 the number of tons of the various sizes of coal shipped by complainant over defendant's road from November 1, 1900, to August 1, 1901, and the amount of the charges thereon, and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid had he had the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company. Second, they find the number of tons shipped by plaintiff over defendant's road, from August 1, 1901, to July 7, 1907, and the charges paid thereon, "at the rates found to have been unreasonable;" and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid at the rates found reasonable.

(4) By the supplemental order issued on the same day, to wit, May 7, 1912, and amended June 15, 1912, which we have heretofore quoted in extenso, the defendant is required to pay, as reparation, to the plaintiff the amount found to have been unjustly discriminatory, and also the amount charged by said defendant over and above the amounts found to be reasonable by the commission.

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14, that "in case damages are awarded, such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report, 256 there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the commission, all of which were irrelevant to an award of actual pecuniary damage.

The assignments of error are numerous, but, for the purposes of this case, we may confine our attention to those which are founded upon the admission by the court, over the objection of the defendant, of these four papers, as evidence before the jury, without discrimination on the part of the court as to the evidential value of the opinions, statements, arguments and conclusions contained therein; to those upon the failure of the court to clearly separate and distinguish, for the benefit of the jury, the findings of fact from the incompetent matter contained in such reports, and to direct that the latter be

wholly disregarded; and to those founded upon the portions of the charge of the court, in which the jury are in effect told that the award of damages made by the commission against the defendant, in the orders of reparation pursuant to its report, was, in the absence of controlling testimony on the part of the defendant, binding upon the jury.

The reparation report of May 7, 1912, contains no findings of fact, but merely refers to the original report of June 8, 1911, "as disposing of all the questions at issue, except the claim for reparation," and is silent as to the information and evidence that may have been adduced before it relevant to that claim. The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff.

257 It is quite conceivable that, though, in the performance of its administrative function, the commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it. As said by Mr. Commissioner Clements in a public address:

"It often happens, in the attempt at reparation for wrongs accomplished, that the party most injuriously affected has no standing in law to claim reparation, for the reason that he was not the shipper and had no dealing with the carrier—he may have been the producer, consumer, or the dealer, and yet the price at which he sold or bought may have been so affected that ultimately he had to bear the burden of the increased rate, although it was paid directly, in the first instance, by the shipper."

The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.

The contention of the plaintiff, sanctioned by the court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a *prima facie* case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the

258 statute, to recover damages, in which the causes for which plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages.

The learned counsel for the plaintiff has not pointed out in his brief, nor claimed in his oral argument that there are any findings of fact upon which the award of damages was made by the com-

mission, except its conclusion as to the existence of a discriminatory charge between 1900 and 1901, and of an unreasonable charge between 1901 and 1907, and those findings of fact and circumstances tending to establish the same. A careful reading of the fifty pages of this report does not disclose any specific findings of fact bearing on the award of reparation, other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it, on the charges of discrimination and of unreasonableness.

Granting, however, that these papers, including this long report in which the findings of fact alone are to be looked for, were admissible, as has been already indicated, it was clearly the duty of the court below to point out such portions of the voluminous record as alone should be considered findings of fact, within the meaning of section 16 of the act. We think in this respect the court has failed to assist the jury in the proper conduct of the case, to the detriment of the defendant. It can hardly be denied that such instructions were not only due from the court to the jury, but that without them, these papers, including this voluminous report of the commission, which in itself constituted a fair sized book, should not have been admitted. The record discloses the fact that, when this report of June 8, 1911, was offered in evidence, it was objected to by the defendant, on the ground that it contained no findings of fact, as required by the statute, or which are material or relevant in a reparation suit. Counsel for plaintiff said in reply:

259 "There are certain findings of the commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the commission may make."

Upon further objection by counsel for defendant, on the ground that

"The report contained many statements purporting to be statements of evidence in the hearing before the Interstate Commerce Commission, arguments, opinions, and conclusions, which the statute does not purport to make admissible as *prima facie* evidence,"

counsel for plaintiff said in reply:

"I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, statements of an historical character, which I think under the cases, the court should control in submitting the case to the jury, and direct their attention to the facts found in the report."

The COURT: "Then your idea is simply to offer the report in evidence, for the purpose of proving that there was an order made, and all relevant material in support of that evidence?"

COUNSEL FOR PLAINTIFF: "Yes, sir."

The COURT: "The court will, of course, indicate to the jury what of the report is relevant."

260 After this very significant colloquy, the report was admitted in evidence, and afterwards, at the close of the testimony, the record states that counsel for the defendant "read to the jury what he stated to be material portions of said exhibits." It is not stated, however, in the record, what portions were so read; and we look in vain for any directions by the court to the jury in regard to this important matter.

The following extracts from the charge indicate the theory upon which the court below submitted the case to the jury, and the attitude of the court towards these reports and orders of the commission:

"It is objected here, gentlemen of the jury, that these reports made by the commission, upon which this suit is based, are not in accordance with the requirements of this act and, therefore, you should find for the defendant. But I instruct you, gentlemen of the jury, that they are, in the judgment of the court, in accordance with the requirements of this section. They state the conclusions as required by the act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit."

* * * * *

"In the presentation of this claim to the court and the jury, the Act of Congress gives the report a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court, before a jury, for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedur directed by the Constitution.

261 But in that proceeding, the suit is *on the report* of the finding of the Interstate Commerce Commission, and their finding if made *prima facie* evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, and that makes its *prima facie* case of its right to claim." (The italics are ours.)

There is no attempt here, or elsewhere in the charge, to separate from the mass of statements in the report what might be considered findings of fact, or to instruct the jury that the statute, in making such findings *prima facie* evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the court gave the jury to understand that the report and findings of the commission as to unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability

of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the commission need not be proved in the suit for damages, but that such findings or order shall be prima facie evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order prima facie evidence of certain
262 facts, but it does not make, or attempt to make, such facts prima facie evidence of anything.

Since the hearing and determination of this case, as also of Lehigh Valley Railroad Co. vs. J. Mitchell Clark, et al., the Supreme Court has promulgated an opinion and decision in Pennsylvania Railroad Co. vs. International Coal Mining Company. This decision bears directly upon some of the fundamental questions involved in the case now under consideration, as it did in those involved in the Clark case, above referred to. On the vital point, whether in this suit, "like other civil suits for damage," actual damage must be proved, we again quote the language of Mr. Justice Lamar:

"There were many provisions of the statute for imprisonment and fines. On the civil side, the act provided for compensation—not punishment. Though the act had been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons vs. Railway*, 167 U. S. 460, construing this section (8), 'before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

After referring to quite a number of cases relied upon by plaintiff, Mr. Justice Lamar says they "do not support the proposition, that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

It hardly needs to be pointed out, as we did in the Clark case, that the ratio decidendi of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also
263 distinctly decides that, in the absence of proof of actual damage to that extent, the amount of the rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. Nor more in this case can the difference between what is found by the commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered. As pecuniary

damages are neither alleged in the pleadings nor proved in the trial, the plaintiff made out no case upon which recovery of damages could be had.

For the reasons above stated, we think the judgment below should be reversed, with directions for a venire de novo.

There was a second complaint made to the Interstate Commerce Commission by defendant (Meeker), in his own name, dated April 13, 1910, pending the proceeding in his first complaint filed July 17, 1907. In the former complaint, as we have seen, the commission were dealing with the question of the unreasonableness of the rates on anthracite coal from the Wyoming region to Perth Amboy, between August 1, 1901, and July 17, 1907, whereas the second complaint dealt with the same charges or rates between July 17, 1907, the date of the filing of the first complaint, and April 13, 1910. The supplemental report of the commission, dated May 7, 1912, was a blanket report and covered both complaints. As to the later case, the report, after dealing with the former, said:

"With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the commission in No. 1180. The latter case covered the period from November 1st,

1900, to July 17th, 1907, while the instant case is designed
264 to secure reparation upon shipments which moved between July 17th, 1907, and April 13th, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report. * * *

The former case was filed with the commission within one year from the passage of the law of June 29th, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is therefore subject to the two year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case, must be denied.

"On basis of our decision in No. 1180, upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant,"

the commission find that the rates exacted by defendant during the two years prior to the filing of his last complaint, were unreasonable to the same extent as found in the report as to the former period from August 1, 1901, to July 17, 1907. The report in this latter case does not purport to include the statements and findings of the original report, or of the supplemental report in regard to the former case. It merely makes a finding of unreasonableness on the basis of their decision in No. 1180. How far it is competent for the commission to proceed upon findings and evidence in a former and distinct case, by merely referring to the same, need not now be decided. The suits in the court below, as to both cases, were tried and submitted to the jury together, upon the same instructions as to

the prima facie character of the report and the award.
265 Therefore, what has been heretofore said in regard to the former case, is applicable to the latter, and need not be repeated.

The judgment, therefore, in the second case must also be reversed, with directions for a venire de novo.

The second paragraph of section 16 of the act concludes as follows:

"All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court, or state court, within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

The manifest intention of Congress here, as in all statutes of limitations, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with

those whose claims having accrued after the passage
266 of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it did not mean to preserve the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905.

(Received and filed August 27, 1913. Saunders Lewis, Jr., Clerk.)

267 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721 (List No. 29).

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

MEEKER & COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed with costs, with directions for a venire de novo.

(Signed)

GEORGE GRAY,

Circuit Judge.

Philadelphia, August 29, 1913.

Endorsed: No. 1721. Order Reversing Judgment Received & Filed Aug. 29, 1913. Saunders Lewis, Jr., Clerk.

268 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

MEEKER & COMPANY, Defendant in Error.

And afterwards, to wit, on the twenty-third day of September, 1913, a petition for rehearing was filed, on behalf of Defendant in Error, upon consideration whereof the Court made the following order:

269 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

Nos. 1720 and 1721.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

MEEKER & COMPANY, Defendant in Error.

Upon consideration of the petition for re-hearing filed in the above-entitled causes, it is now hereby ordered that the same be granted and that the cases be added to the present October Term List for re-argument.

(Signed)

GEORGE GRAY,
Circuit Judge.

Philadelphia, October 15, 1913.

Endorsed: Nos. 1720 and 1721. Order Granting Re-hearing and directing cases placed on list for re-argument. Received & Filed Oct. 15, 1913. Saunders Lewis, Jr., Clerk.

270 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

And afterwards, to wit, on the third day of December, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof;

And afterwards, to wit, on the nineteenth day of February, 1914, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

- 271 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,
vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business Under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,
vs.

HENRY E. MEEKER, Defendant in Error.

Opinion of the Court by Gray, Circuit Judge.

- 272 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,
vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business Under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,
vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

On September 3, 1912, Henry E. Meeker, surviving partner of the firm of Meeker & Company, defendant in error (hereinafter called the plaintiff), instituted in the court below, under the pro-

visions of section 16 of the Act to Regulate Commerce, a suit
273 against the Lehigh Valley Railroad Company, plaintiff in error (hereinafter called the defendant), to recover damages alleged to have been incurred by reason of certain acts and practices of the defendant, in violation of said act, and therefore the subject of complaint by the said plaintiff before the Interstate Commerce Commission.

To the judgment obtained by the plaintiff against the defendant, this writ of error has been sued out by the latter.

In his petition in the court below, "setting forth briefly the causes for which he claims damages," plaintiff charges that the defendant company, as a common carrier, subject to the provisions of the Interstate Commerce Act, from November 1, 1900, to August 1, 1901, discriminated against his firm, in that it demanded and received from Meeker & Company greater compensation for services rendered in the transportation of anthracite coal, from the Wyoming region in Pennsylvania, to Perth Amboy, in New Jersey, than it demanded or received from another shipper for "a like and contemporaneous service in the transportation" of anthracite coal between the same points, in violation of section 2 of the Act to Regulate Commerce; and further charges that from August 1, 1901, to July 17, 1907, the defendant company demanded and received from plaintiff's firm unjust and unreasonable rates for the transportation of anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy, New Jersey, in violation of said act.

In support of this charge, it is alleged in the petition, as follows: That defendant is a common carrier engaged in interstate railroad transportation between points in the states of Pennsylvania, New Jersey and New York, and is largely engaged in transporting anthracite coal for plaintiff and other shippers over its lines.
274 from collieries in the Wyoming coal region of Pennsylvania, to Perth Amboy, in the state of New Jersey; that one of said shippers other than plaintiff is the Lehigh Valley Coal Company, a corporation of the state of Pennsylvania, engaged in the business of mining and buying anthracite coal in said Wyoming region.

Plaintiff alleges that from November 1, 1900, to August 1, 1901, the defendant company, intending to unjustly and unreasonably discriminate in favor of, and to prefer, the Lehigh Valley Coal Company to the plaintiff and other independent shippers, unlawfully charged the plaintiff with excessive and discriminatory rates on 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, shipped between the said Wyoming coal region and Perth Amboy, New Jersey, the total charges on such coal amounting to \$129,989.18, whereas, had the plaintiff been given the benefit of the rates charged by defendant for similar shipments of the said Lehigh Valley Coal Company, the total charge upon plaintiff's said shipments would have been \$11,909.33 less than the sum exacted as above during the period aforesaid, which sum, with interest thereon from August 1, 1901, was awarded by the Interstate Commerce Commission in favor of the plaintiff, in their supplemental report dated May

7, 1912, as also in their orders supplemental thereto, issued June 8 and 15, 1912, attached to said petition and marked Exhibits "A," and "B," respectively.

Plaintiff further alleges that from August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner, over its said line of road from the Wyoming coal region, aforesaid, to Perth Amboy, at tide water in New Jersey, the following unreasonable and excessive charges upon all shipments of anthracite coal, to
275 wit: \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 per ton for coal smaller than buckwheat coal. That from August 1, 1901, to July 1, 1907, these shipments amounted to 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and that the charges paid thereon amounted to \$685,375.27, at rates exceeding \$1.40 per gross ton in prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat coal, the rates fixed by the Interstate Commerce Commission as proper and reasonable, the amount of such excess being \$58,236.45, paid by plaintiff to the defendant. That said payments were made under protest that the same were unreasonable and excessive.

The petition then recites that on July 17, 1907, plaintiff filed with the Interstate Commerce Commission a complaint, setting forth the aforesaid unreasonable and discriminatory practices and charges of defendant, to the prejudice of the plaintiff and in violation of the Act to Regulate Commerce, and praying for a hearing upon the allegations set forth in said complaint, and that the commission make an order, requiring the defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line, from the Wyoming region to tidewater at Perth Amboy, and awarding complainants reparation in damages in such amount as they might have suffered loss by reason of said improper practices and charges. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the complaint regularly heard and argued by all the parties thereto, and submitted. A report was duly filed by the said commission on June 8, 1911, in Docket No. 1180, a copy of which report, with the conclusions and orders of the commission, is attached to plaintiff's petition as "Exhibit

C."

276 By this report the Interstate Commerce Commission held that the charges by the defendant company to the plaintiff, between November 1, 1900, and August 1, 1901, were discriminatory, and therefore unlawful, and also that the charges of defendant company, between August 1, 1901, and July 1, 1907, were unreasonable, and the same were ordered to be discontinued, and that reasonable and proper charges for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid, should thereafter be \$1.40 per gross ton on prepared sizes, instead of \$1.55, the rate charged, and \$1.30 on pea coal, instead of \$1.40, the rate charged, and \$1.15 on buckwheat coal, instead of \$1.20, the rate charged, and the commission held "that reparation

should be awarded upon the basis of the rates herein found to be reasonable, upon all shipments of coal by complainants from the Wyoming region to Perth Amboy, since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants."

Plaintiff's petition further recites that a hearing was had upon the question of reparation, and that a supplemental report was filed by said commission May 7, 1912. In this report, attached to the petition and marked "Exhibit A," the commission state "that the original report in No. 1180 disposed of all the questions at issue, except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature. A further hearing has been held and complainant has presented exhibits, showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments.

277 These exhibits have been examined by defendant and admitted to be correct."

They then refer to their finding in the original report, that the rates exacted by defendant from November 1, 1900, to August 1, 1901, were unjustly discriminatory and in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and the defendant, and to the further finding in said original report, that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat.

They then proceed to say that on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, they now find that, during the period from November 1, 1900, to August 1, 1901, in regard to the charges exacted from plaintiff and found to have been unjustly discriminatory, that complainant was entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. And they further find, in regard to the rates exacted for coal shipped by plaintiff from August 1, 1901, to July 7, 1907, which were found unreasonable in the original report, that plaintiff is "entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45, from September 1, 1911."

Following said supplemental report, and on the same day, to wit, May 7, 1912, a so-called supplemental order was entered, which, as amended in an unimportant particular May 15, 1912, read as follows:

278 "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having

been had, and the commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the fifteenth day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of six per cent. per annum from the first day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region, in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the commission.

"It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the fifteenth day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of six per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of six per cent. per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unreasonable, as more fully and at large appears in and by said report of the commission."

The petition then avers that a true copy of this order of the commission was duly served upon the defendant, and demand made for payment of the sum claimed in the petition, and as set forth in the aforesaid orders of the commission and attached to the petition as Exhibits "A" and "B," but the defendant had failed and refused to pay the said sums, or any part thereof. "Wherefore," it is alleged, "petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce." (The theory of the petition thus appears to be that this is a proceeding to enforce the order of reparation made by the commission, and not a suit for the recovery of such damages as plaintiff has actually incurred by reason of the alleged unlawful acts of defendant, as found by the commission.) The court is then prayed to enter a rule upon said defendant to file a plea, answer, or demurrer to the petition within thirty days from the date of serving a copy of the same, and to fix a time and place for the trial of the cause under the provisions of the Act to Regulate Commerce.

The defendant accordingly filed, October 5, 1912, its plea of the

general issue, the bar of the statutes of limitation applicable to plaintiff's claim, and for a further plea averred that the Interstate Commerce Commission had no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce, and that there was before the commission no substantial evidence to sustain its findings and order.

280 At the trial, the plaintiff put in evidence the report of the commission, dated June 8, 1911 (see Record, pp. 22-73), and the order thereon of the same date, requiring the defendant to abstain from charging or receiving its present rates for the transportation of coal so found to be unreasonable, and requiring defendant for a period of two years thereafter to maintain the rates found in said report to be reasonable. Also, the supplemental report of the commission, dated May 7, 1912, finding the reparation or damages to which the plaintiff was entitled, and the supplemental order of that date, amended by that of June 15, as hereinbefore set out, requiring the defendant to pay to plaintiff, on or before the first day of August, 1912, the sums found due as and for reparation in said supplemental report.

Save the testimony of the plaintiff (Meeker), bearing upon the charge of discrimination as to freight rates between November 1, 1900, and August 1, 1901, no evidence, other than these four papers, was offered by plaintiff at the trial. The defendant offered no testimony, except that of Mr. George W. Field, one of its counsel, who attended the hearing before the Interstate Commerce Commission and made certain calculations from Exhibits "A" and "B," offered in evidence by defendant, dividing up the shipments therein set out between different dates, to which the different statutes of limitation might apply. Plaintiff's contention was and is, that these four papers, in the absence of any evidence on the part of the defendant, made out a prima facie case in his favor and entitled him to a recovery, as damages, of the amounts awarded by the commission.

This was the view taken by the learned judge of the court below, in submitting the case to the jury, and a verdict was accordingly rendered in favor of the plaintiff for the aggregate sums
281 awarded by the commission, as reparation, which, with interest thereon, amounted to \$109,280.17. To the judgment thereon, this writ of error is sued out by the defendant. Certain of the assignments challenge the constitutionality of section 16 of the Act to Regulate Commerce, on the ground that its provision, that the findings and order of the commission shall be prima facie evidence of the facts therein stated, is unconstitutional, in that it confers judicial power upon an administrative commission, deprives the defendant of its property without due process of law, and denies to it its right of trial by jury; and also, on the ground that the provision of said section, conferring upon the commission authority to determine and award damages to any party complaining of the violation of the act by a common carrier and to direct such carrier to pay to the complainant before a day named the sum so awarded, and declaring that, on a trial of a suit to recover such damages, the facts stated in the findings and order of the commission shall be

prima facie evidence of the facts therein stated, is not a proper exercise of the powers given to Congress to regulate commerce. The latter point was raised before this court in the case of *Western New York & P. R. R. Co. vs. Penn Refining Co.*, 70 C. C. A. 23. We there said:

"The constitutionality of the provisions making findings of fact prima facie evidence before a jury, has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guaranty relative to trial by jury in the courts of the United States, does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision, counsel for the plaintiff in error does not attempt a reargument of the question before this court.
282 The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute. The questions raised by the assignments of error which are most material, relate to the submission of the reports and orders of the Interstate Commerce Commission, and to how far and in what respect the same are to be taken as prima facie evidence of facts stated by them. Also, the question whether the facts of which such reports and orders are the prima facie evidence, are sufficient, in the absence of countervailing testimony by the defendant, to maintain the plaintiff's suit and claim for damages.

This court has already, in a decision at this term, in the case of *Lehigh Valley Railroad Co. et al. vs. J. Mitchell Clark et al.*, discussed at some length the history of the legislation embodied in the Act to Regulate Commerce, and its amendments. As we there pointed out, section 14 of the original act made it the duty of the commission to make a report in writing, which should include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 16 provided for the refusal or neglect "to obey any lawful order or requirement of the commission, by authorizing the commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States, sitting in equity, and empower such court, as a court of equity, to hear and determine the matter," etc. And on such hearing, the report
283 of said commission shall be prima facie evidence of the matters therein stated. And it was provided that if it be made to appear to the court "that the lawful order or requirement of said commission, drawn in question, has been violated or disobeyed," the court may issue "a writ of injunction, or other proper process, mandatory or otherwise, to restrain the common carrier from further violation or disobedience of such order."

From the fact that it was to a court of equity alone that resort was to be had for the enforcement of an order of the commission,

it was apparent that it was only to such ministerial orders of the commission as could be enforced by a court of equity, that the act in this respect could apply, and that a recommendation or an award of damages by the commission was not such an order or requirement as could be thus enforced without a violation of the seventh amendment to the Constitution, in regard to jury trials. This consideration suggested the Act of March 2, 1889, amending section 16 of the original act by adding thereto the following:

"If the matters involved in such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the Constitution of the United States, and any such common carrier shall violate or refuse, or neglect to obey or perform the same, after notice, etc., * * * it shall be lawful for any company or person interested * * * to apply in a summary way, by petition, to the Circuit Court of the United States, sitting as a court of law, * * * alleging such violation or disobedience as the case may be."

Then, after providing for a jury trial, the amendment concludes: "At the trial, the findings of fact of said commission, as set forth in its report, shall be prima facie evidence of the matters therein stated."

284 The distinction thus clearly made between reparation and non-reparation cases, is made still more clear in the so-called "Hepburn" Act of 1906, in which section 14 was amended so as to read as follows:

"That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

This distinction was still further emphasized by so amending section 16 as to provide that, where, after hearing on a complaint, the commission should determine that complainant is entitled to an award of damages, it

"shall make an order, directing the carrier to pay to the complainant the sum to which he is entitled, on or before the day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file in the Circuit Court of the United States for the district in which he resides, * * * a petition, setting forth, briefly, the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that, on the trial of such suit, the findings and order of the commission shall be prima facie evidence of the facts therein stated."

After other provisions, the section, as amended, further provides (the italics being ours):

285 "If any carrier fails or neglects to obey any order of the commission, *other than for the payment of money*, and while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the Circuit Court in the

district where such carrier has its principal operating office, * * * for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise."

Thus, the inherent and obvious distinction between reparation and non-reparation cases is clearly recognized by Congress. It could hardly be otherwise than that such recognition should be made. The great purposes of the act are largely accomplished by the administrative control given to the Commerce Commission over all carriers, as to interstate commerce, and that administrative control is made efficient by the peculiar jurisdiction of a court of equity, to which the commission or a party interested may apply for the enforcement of its orders. In such cases, the whole record of the investigation by the commission is before the court, and the only matter to be determined is that the order made by the commission is a lawful order; that is, made within the scope of the authority conferred by Congress, and upon a full hearing of the parties, with the opportunity accorded of adducing testimony and having it considered. (I. C. C. 286 et al. vs. Louisville & Nashville R. R. Co., lately decided by the Supreme Court of the United States and not yet reported.)

When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the commission as an administrative body, and of enforcing its proper control over interstate commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a quasi public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the kind are determined, by a jury trial at common law.

The right to a jury trial having thus been preserved by the provisions of the act above referred to, under them "the parties are entitled," as said by us in *Western New York & P. R. R. Co. vs. Penn Refining Co.* (supra), "to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards, furnished by a proper application of the principles of evidence and the proper submission of the case to the jury." This right of trial by jury is not granted, as of grace, by the act, but is a constitutional right of which the defendant cannot be

deprived. The consistency and harmony of the reparation proceedings as authorized by the act, with the administrative features thereof, are, however, as pointed out by the Supreme Court in *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, maintained by Congress having made, in the exercise of its legislative
287 power as to the law of evidence, the "findings and order of the commission *prima facie* evidence of the facts therein stated."

In all other respects, a suit under the act shall proceed "like all other civil suits for damages." We cannot give less than full meaning and effect to this language. What may be the facts or classes of facts, to which this provision of the act applies, must be the important question in this, as in other cases, for the determination of the court. As under the decision in the *Abilene* case, the literal language of the act, in allowing a complainant as to all matters, to bring an independent common law action for damages, cannot be reconciled with the general scope of the act, or with other particular provisions thereof, a suit for damages must in all cases calling for an exercise of the discretion of the administrative and rate-regulating body, be founded upon a previous application to and investigation by the Commerce Commission, and instituted with reference to "rights recognized in or to duties imposed by the act." We think, therefore, it clearly follows from the premises:

(1) That the finding of the commission as to the reasonableness or otherwise of the rate charged by the carrier in interstate commerce, is an administrative function properly and constitutionally delegated by the legislative power to the commission, and is, if lawfully made, conclusive. If such finding of the commission is, that a given rate charged by a carrier in interstate commerce is unreasonable, it is as if the unreasonableness of such rate were fixed by the statute. The lawfulness of such finding is subject to judicial inquiry only in the respects above referred to.

(2) The finding by the commission, that a given rate is unreasonable, while pertinent to the issue, in that it establishes a violation of the act, is not decisive of the question of liability
288 for damages under section 8, in such case as the present, either *prima facie* or otherwise.

(3) The pertinency and evidential weight and value of the facts as to which the findings and order are *prima facie* evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a *prima facie* case for the plaintiff.

The importance of the exceptional privilege thus conferred upon the plaintiff, of not being required to prove, in the first instance, the facts found by the commission, makes it the more necessary that the court should point out to the jury what are and what are not such findings. The imperative command of section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the commission, with reference to their proposed use in a jury trial, and evidently with this understanding, the original rule of the commission was made, that "upon the final submission of the case to the commission, either party may submit proposed findings of fact for the consideration of the commission,

which findings must embrace only the material facts of the case supposed to be established by the testimony."

No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the commission, what were properly to be considered such findings. We can only reiterate what was said by us in the Penn Refining Company case (*supra*):

289 "While not expressing the opinion that findings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be disregarded. Unless this course be pursued, the parties are deprived, at least in part, of the benefits and safeguards intended to be secured to them under the constitutional guaranty of a trial by jury."

It will be remembered that the only evidence adduced by the plaintiff in support of his claim for damages at the trial, consisted of the four documents to which we have above referred, viz:

(1) The original report of the commission, dated June 8, 1911, occupies fifty printed pages of the record. In this report the commission find that the complainants have sustained the allegation of unjust discrimination under the second section of the act, and that reparation, with interest from August 1, 1901, will be awarded on this account. At the close of their report, they find, as follows:

"After careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits, respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy * * * are unreasonable so far as they exceed"

a certain amount. (This finding, as defendant contends, is not a finding that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, but that the then present rates, as they existed at the date of the report, were unreasonable.) The opinion is then expressed that reparation should be awarded upon the basis of the rates found in said report to be reasonable.

290 (2) This report is followed by an order of the same date, commanding the defendant "to desist, on or before the fifteenth day of August, 1911, and for a period of two years thereafter, from charging or demanding its present rates, and that defendant be required to establish, on or before said date, and maintain for a period of two years thereafter, rates not in excess" of the rates therein specified.

(3) A supplemental report, made by the commission, May 7, 1912, which states that the original report disposed of all the questions at issue, except the claim for reparation, and that the case was held open for further information regarding that feature. It then states that a further hearing had been held and complainant had presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on the

amount of such shipments. They then say that in their original report they had found that the rates charged complainant for transportation of coal during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory to an extent named, and that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, so far as they exceeded rates established as reasonable by the commission. This latter reference to the original report is, as claimed by the defendant, inaccurate. They then say that, on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation (which is nowhere set out), they find, first, the number of tons of the various sizes of coal shipped by complainant over defendant's road from November 1, 1900, to August 1, 1901, and the amount of the charges thereon, and that complainant has been damaged to the extent of the difference between the 291 amount which he did pay and the amount he would have paid had he had the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company. Second, they find the number of tons shipped by plaintiff over defendant's road, from August 1, 1901, to July 7, 1907, and the charges paid thereon, "at the rates found to have been unreasonable"; and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid at the rates found reasonable.

(4) By the supplemental order issued on the same day, to wit, May 7, 1912, and amended June 15, 1912, which we have heretofore quoted in extenso, the defendant is required to pay, as reparation, to the plaintiff the amount found to have been unjustly discriminatory, and also the amount charged by said defendant over and above the amounts found to be reasonable by the commission.

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14, that "in case damages are awarded, such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report, there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the commission, all of which were irrelevant to an award of actual pecuniary damage.

The assignments of error are numerous, but for the purposes of this case, we may confine our attention to those 292 which are founded upon the admission by the court, over the objection of the defendant, of these four papers, as evidence before the jury, without discrimination on the part of the court as to the evidential value of the opinions, statements, arguments and conclusions contained therein; to those upon the failure of the court to clearly separate and distinguish, for the benefit of the jury,

the findings of fact from the incompetent matter contained in such reports, and to direct that the latter be wholly disregarded; and to those founded upon the portions of the charge of the court, in which the jury are in effect told that the award of damages made by the commission against the defendant, in the orders of reparation pursuant to its report, was, in the absence of controlling testimony on the part of the defendant, binding upon the jury.

The reparation report of May 7, 1912, contains no findings of fact, but merely refers to the original report of June 8, 1911, "as disposing of all the questions at issue, except the claim for reparation," and is silent as to the information and evidence that may have been adduced before it relevant to that claim. The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff. It is quite conceivable that, though, in the performance of its administrative function, the commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it. As said by Mr. Commissioner Clements in a public address:

293 "It often happens, in the attempt at reparation for wrongs accomplished, that the party most injuriously affected has no standing in law to claim reparation, for the reason that he was not the shipper and had no dealing with the carrier—he may have been the producer, consumer, or the dealer, and yet the price at which he sold or bought may have been so affected that ultimately he had to bear the burden of the increased rate, although it was paid directly, in the first instance, by the shipper."

The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.

The contention of the plaintiff, sanctioned by the court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a *prima facie* case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the statute, to recover damages, in which the causes for which plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages.

The learned counsel for the plaintiff has not pointed out in his

brief, nor claimed in his oral argument that there are any findings of fact upon which the award of damages was made by the commission, except its conclusion as to the existence of a discriminatory charge between 1900 and 1901, and of an unreasonable charge between 1901 and 1907, and those findings of fact and circumstances tending to establish the same. A careful reading of the fifty pages of this report does not disclose any specific finding of fact bearing on the award of reparation, other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it, on the charges of discrimination and of unreasonableness.

Granting, however, that these papers, including this long report in which the findings of fact alone are to be looked for, were admissible, as has been already indicated, it was clearly the duty of the court below to point out such portions of the voluminous record as alone should be considered findings of fact, within the meaning of section 16 of the act. We think in this respect the court has failed to assist the jury in the proper conduct of the case, to the detriment of the defendant. It can hardly be denied that such instructions were not only due from the court to the jury, but that without them, these papers, including this voluminous report of the commission, which in itself constituted a fair sized book, should not have been admitted. The record discloses the fact that, when this report of June 8, 1911, was offered in evidence, it was objected to by the defendant, on the ground that it contained no findings of fact, as required by the statute, or which are material or relevant in a reparation suit. Counsel for plaintiff said in reply:

"There are certain findings of the commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the commission may make."

295 Upon further objection by counsel for defendant, on the ground that

"The report contained many statements purporting to be statements of evidence in the hearing before the Interstate Commerce Commission, arguments, opinions, and conclusions, which the statute does not purport to make admissible as prima facie evidence,"

counsel for plaintiff said in reply:

"I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, statements of an historical character, which I think under the cases, the court should control in submitting the case to the jury and direct their attention to the facts found in the report."

The Court: "Then your idea is simply to offer the report in evidence, for the purpose of proving that there was an order made, and all relevant material in support of that evidence?"

COUNSEL FOR PLAINTIFF: "Yes, sir."

The COURT: "The court will, of course, indicate to the jury what of the report is relevant."

After this very significant colloquy, the report was admitted in evidence, and afterwards, at the close of the testimony, the record states that counsel for the defendant "read to the jury what he stated to be material portions of said exhibits." It is not stated, however, in the record, what portions were so read; and we look in vain for any directions by the court to the jury in regard to this important matter.

296 The following extracts from the charge indicate the theory upon which the court below submitted the case to the jury, and the attitude of the court towards these reports and orders of the commission:

"It is objected here, gentlemen of the jury, that these reports made by the commission, upon which this suit is based, are not in accordance with the requirements of this act and, therefore, you should find for the defendant. But I instruct you, gentlemen of the jury, that they are, in the judgment of the court, in accordance with the requirements of this section. They state the conclusions as required by the act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit."

* * * * *

"In the presentation of this claim to the court and the jury, the Act of Congress *gives the report* a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a jury, for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution. But in that proceeding, the suit is *on the report* of the finding of the Interstate Commerce Commission, and their finding is made *prima facie* evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, *and that makes its prima facie* case of its right to claim." (The italics are ours.)

297 There is no attempt here, or elsewhere in the charge, to separate from the mass of statements in the report what might be considered findings of fact, or to instruct the jury that the statute, in making such findings *prima facie* evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the court gave

the jury to understand that the report and findings of the commission as to discrimination and unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the commission need not be proved in the suit for damages, but that such findings or order shall be *prima facie* evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order *prima facie* evidence of certain facts, but it does not make, or attempt to make, such facts *prima facie* evidence of anything.

Since the hearing and determination of this case, as also of *Lehigh Valley Railroad Co. vs. J. Mitchell Clark, et al.*, the Supreme Court has promulgated an opinion and decision in *Pennsylvania Railroad Co. vs. International Coal Mining Company*. This decision
298 bears directly upon some of the fundamental questions involved in the case now under consideration, as it did in those involved in the Clark case, above referred to. On the vital point, whether in this suit, "like other civil suits for damage," actual damage must be proved, we again quote the language of Mr. Justice Lamar:

"There were many provisions of the statute for imprisonment and fines. On the civil side, the act provided for compensation—not punishment. Though the act had been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons vs. Railway*, 167 U. S. 460, construing this section (8), 'before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

After referring to quite a number of cases relied upon by plaintiff, Mr. Justice Lamar says they "do not support the proposition, that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

It hardly needs to be pointed out, as we did in the Clark case, that the ratio decidendi of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also distinctly decides that, in the absence of proof of actual damage to that extent, the amount of the rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. Nor more in this case can the difference between what is found by

the commission to be the unreasonable tariff rate and that
299 fixed as a reasonable one, be made the measure of the damage
that the plaintiff has suffered. As pecuniary damages are
neither alleged in the pleadings nor proved in the trial, the plaintiff
made out no case upon which recovery of damages could be had.

For the reasons above stated, we think the judgment below should
be reversed, with directions for a venire de novo.

There was a second complaint made to the Interstate Commerce
Commission by defendant (Meeker), in his own name, dated April
13, 1910, pending the proceeding in his first complaint filed July 17,
1907. In the former complaint, as we have seen, the commission
were dealing with the question of the unreasonableness of the rates
on anthracite coal from the Wyoming region to Perth Amboy, be-
tween August 1, 1901, and July 17, 1907, whereas the second com-
plaint dealt with the same charges or rates between July 17, 1907,
the date of the filing of the first complaint, and April 13, 1910. The
supplemental report of the commission, dated May 7, 1912, was a
blanket report and covered both complaints. As to the later case,
the report, after dealing with the former, said:

"With the exception of the reparation features, the issues involved
in No. 3235 have been passed upon by the commission in No. 1180.
The latter case covered the period from November 1, 1900, to July
17, 1907, while the instant case is designed to secure reparation upon
shipments which move between July 17, 1907, and April 13, 1910.
The petition in the present case, therefore, resolves itself into a
prayer for reparation on shipments moving subsequent to the period
covered by the original report, on basis of the conclusions
300 announced in that report. * * * The former case was
filed with the commission within one year from the passage
of the law of June 29, 1906, and consequently was not limited to
causes of action that accrued within two years prior to the filing of
the complaint. The present proceeding, however, was instituted
more than one year subsequent to the passage of that law, and is
therefore subject to the two-year limitation of the statute. Com-
plainant's prayer for reparation on shipments moving more than
two years prior to the filing of the complaint in this case, must be
denied.

"On basis of our decision in No. 1180, upon consideration of the
evidence submitted at the hearing of the present case regarding the
amount of reparation due complainant,"

the commission find that the rates exacted by defendant during the
two years prior to the filing of his last complaint, were unreasonable
to the same extent as found in the report as to the former period
from August 1, 1901, to July 17, 1907. The report in this latter
case does not purport to include the statements and findings of the
original report, or of the supplemental report in regard to the former
case. It merely makes a finding of unreasonableness on the basis of
their decision in No. 1180. How far it is competent for the com-
mission to proceed upon findings and evidence in a former and dis-
tinct case, by merely referring to the same, need not now be decided.

The suits in the court below, as to both cases, were tried and submitted to the jury together, upon the same instructions as to the *prima facie* character of the report and the award. Therefore, what has been heretofore said in regard to the former case, is applicable to the latter, and need not be repeated.

The judgment, therefore, in the second case must also be reversed, with directions for a *venire de novo*.

301 The second paragraph of section 16 of the act concludes as follows:

"All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court, or state court, within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

The manifest intention of Congress here, as in all statutes of limitations, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with those whose claims having accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of

302 Congress, to say that, in giving this time, it did not mean to preserve the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905.

303 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker. Doing Business under the Trade Name of Meeker & Company, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

On Rehearing.

Before Gray, Buffington, and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

The able and interesting argument at the rehearing in this case has challenged the careful reconsideration by the court of the grounds upon which were based the conclusions announced in their original opinion.

304 We had already, at the same term, discussed very fully the Interstate Commerce Act of 1887, with the amendments of 1889 and 1906, relevant to the questions now presented, in the case of the Lehigh Valley Railroad Company vs. J. Mitchell Clark, et al., 207 Fed. Rep. 717. We therefore considered it unnecessary to repeat that discussion and analysis of the act and its amendments in the opinion filed in the present case, though we applied the principles of that decision thereto.

With this reference to our opinion in the Clark case, we confine ourself to what seem to us the crucial questions raised by the petition for, and argument at, the rehearing.

Premising what we have before said, that the provisions of the act, granting a right of action to shippers for damages incurred in consequence of violations of the act by the interstate carrier, while important, are incidental and not primary, in the scheme of the act for the control and regulation of the actual operation of interstate commerce, in the general interests of the public, let us again consider the nature and scope of such right, as disclosed by the language and general purposes of the statute creating it.

The learned counsel for the defendants in error, in his argument at the rehearing, contended with much insistence that the act, in denouncing unreasonable rates and creating a liability to the shipper therefor, was merely declaratory of the common law, and in support of this proposition, cites the following language in the opinion of Mr. Justice White, in the *Abilene Cotton Oil* case, 204 U. S. 426, 436:

“Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy, 305 that when a carrier accepted goods without payment of the cost of carriage, or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that, even where on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge.”

From this it was argued that (we quote from defendant in error's supplemental brief): (1) “The measure of damage was clearly the difference between the unreasonable rate paid and the reasonable rate. (2) That all that the shipper had to establish, consequently, was the amount of the charges which he had paid, and what the reasonable charge would have been. (3) Having established these facts, the shipper was entitled, as a matter of law, to recover the difference between the two rates—that is the overcharge.” These propositions constitute the gravamen of defendant in error's whole argument.

In the case quoted from, the Supreme Court was dealing with a judgment in a state court, where suit had been brought to recover damages from the defendant company by reason of the exaction of an alleged unjust and unreasonable rate, which exceeded in the aggregate, by the sum sued for, an alleged just and reasonable charge. There had been no application to, or finding by, the Interstate Commerce Commission, in regard to the unreasonableness of the rate. Mr. Justice White conceded these common law rights of action, but proceeded to show that they were repugnant to the provisions of the

Interstate Commerce Act, which was intended “to afford an 306 effective and comprehensive means for redressing wrongs resulting from violations of the act,” and that a shipper cannot maintain an action at common law for excessive and unreasonable freight rates exacted on interstate shipments, where rates charged had been duly fixed by the carrier according to the act, and not found to be unreasonable by the commission. We think this whole opinion tends to emphasize the distinction between the common law rights of action referred to, and the right of action created and defined by the act. A situation where the rates paid were the rates fixed by the act, as the only legal rates that could be demanded or paid, even though those rates are declared afterward by the commission, in the performance of its administrative function, to be unreason-

able, differs essentially from a situation where an illegal rate is, in the first instance, coerced or extorted by the carrier. The tariff rate paid by the shipper was the legal rate, any departure from which is made by the statute a misdemeanor and punishable by fine. There is consequently no "overcharge" to be recovered as such, as in the cases cited at common law, and no coercion except that of the law. It is obvious that, even though the statute were silent as to the measure of damage applicable to the first situation, that measure could not justly be the same as in the second. That section 22 does not help the argument of the defendant in error in this respect, is shown by Mr. Justice White, when he further says:

"It is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the Act to Regulate Commerce, viz., 'Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act."

We repeat that this decision of the Supreme Court so far from sustaining the contention of the defendant in error, that the Interstate Commerce Act was merely declaratory of the common law, and that the common law measure of damage was applicable to the liability created by section 8 of the act, clearly distinguishes the liability at common law, as it existed in the cases cited by Mr. Justice White, from that created by the act for every violation of its provisions. We turn to the pertinent provisions of the act.

After requiring that all charges by common carriers for transportation shall be just and reasonable, and inhibiting unjust and unreasonable charges for such service, prohibiting rebates and unreasonable preferences, and declaring the same to be unlawful, the statute, in section 8 thereof, and there alone, creates the liability with which we are here concerned. We again quote from that section:

"That in case any common carrier, subject to the provisions of this act, shall do * * * any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act * * * in this act required to be done, such common carrier *shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.*" (The italics are ours.)

The learned counsel for the defendant in error seems to argue that this statute creates a general liability, independent of any relativity, limitation or qualification, as soon as a violation of the act is shown.

That this is not so, is apparent. It is not a general liability that is imposed by the act, but a particular liability to the person injured "for the full amount of damages sustained in consequence of any violation of the provisions of the act." The liability thus defined is the only civil liability anywhere imposed, and no other or different civil liability can attach itself to any violation

of the act. The liability thus imposed being the same for all violations of the law, without exception, that liability, as defined by the statute, is to the "person or persons injured for the full amount of damages sustained in consequence of any such violation of the provisions of this act." We cannot avoid the plain and exigent meaning of this language. It is impossible, in view of it, to attribute to Congress an intention to apply it to only a portion of the offenses against the act.

The logic of the situation, as recognized by the decisions of the Supreme Court in the Abilene and other recent cases, would seem to be, that a civil suit for damages may be brought under sections 8 and 9 in the District Court of the United States, for any violation of the act; that, if the violation be a simple disobedience of a specific requirement of the statute, whether of omission or commission—such, for instance, as giving a rebate—nothing more is required than to prove that specific act, and no finding of the commission is necessary to the jurisdiction of the court; but, where the illegality of the act charged depends upon whether it be reasonable or unreasonable, the option given by section 9 cannot be literally interpreted, as the determination of this issue calls for an exercise of the discretion of the administrative body. When that administrative function has been performed, and the rate complained of has been found to be unreasonable or unjust, such finding is conclusive, whether it relate

to past or present rates or practices. As said by Mr. Justice
309 Lamar, it is as if the reasonable rate or practice was established in the statute itself. It would then only be necessary to prove in court this finding of the commission, that such a specific act or practice was unreasonable, and therefore unlawful under the act, just as it was only necessary, without any finding of the commission to that effect, to show that a specific rebate has been given that was declared unlawful by the act itself. The further procedure in the case supposed, as indicated by the act, must be in all respects "like other civil suits for damages," except that the plaintiff may, in proving his pecuniary loss or damage, in consequence of a violation of the act by the defendant, use the facts stated in any finding or order of the commission in support of his claim, without further proof of such facts, supplementing the same by other evidence as, in his judgment, the exigence of the case may require.

Referring to a contention in the International Coal Company case, that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the commission, Mr. Justice Lamar, in the recent Mitchell Coal Company case, said:

"This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the commission and not the courts should pass upon that administrative question. When

such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statutes. But since the commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited.”

From this illuminating view of the requisite procedure under the act, harmonizing as it does its different provisions and “giving every shipper equal rights and preserving uniformity of practice,” it would seem that all other shippers than the complainant might bring their several actions in the District Court, “for the full amount of damages sustained in consequence of” the same violation of the act, without any further finding by the commission. It having once been established what particular conduct or practice of the carrier was illegal, it would only be incumbent on a plaintiff to show the damage, if any, sustained thereby. No award of reparation, therefore, would be necessary in such cases to the jurisdiction of the court, the suits being cognizable under sections 8 and 9, as in the case of suits for damages occasioned by rebates or other specific violations of the act.

From this it seems irresistibly to follow, that all shippers prosecuting suits for damages “sustained in consequence of any violation of the provisions of the act,” are on the same footing, whether the violation be a specific act made illegal by the statute, or one in which the illegality of the act depends upon the finding of fact by the commission, that the act or practice complained of is unreasonable or unjust. In like manner it follows that the measure of damages sustained by a shipper in consequence of any violation of the act, must be the same in all cases. We find no authority in the act itself, or in the decisions of the Supreme Court, for applying a different measure of damage in the case of any violation of the act, than that established by the eighth section, viz., “the full amount of damages sustained” by reason thereof. To hold that, in one case actual damage must be proved, and in the other not, introduces a confusion in the administration of the law, for which the only justification must be the express and mandatory requirement of the statute, or the express and controlling decision of the Supreme Court. The measure of the statute is thus stated by the Supreme Court in the International Coal Mining case:

“The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that, in a suit at law both the fact and the amount of damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this conten-

tion is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record."

This statement of the Supreme Court is general, and is applicable to any and all cases where damages are sought by one claiming to have been injured by a violation of the act. It would seem to dispose of the contention of the defendants in error, referred to above and approved by the court below, that "the shipper was entitled as matter of law to recover the difference between the two rates," that is, the tariff rate charged to the shipper, and the lower rate found to be reasonable by the commission. Herein is the essential
 312 vice of defendant in error's argument, that the fact and amount of pecuniary loss in a case like the present, is matter of law, and not of fact to be determined by the jury. It does not help the matter that the defendants in error argue that the rate charged having been conclusively found by the commission as unreasonable, the award of the difference between that rate and the rate found to be reasonable is only prima facie evidence of the liability of defendant for the amount so awarded. The act makes nothing prima facie evidence of the liability created by section 8. The prima facies mentioned in section 16 is attached to the facts stated in the finding and order of the commission, which facts may or may not be sufficient to establish that liability.

Section 16 of the original act has been so amended as to meet the objection that was made soon after its enactment, that in reparation cases, the order of the commission could not be enforced by a summary proceeding in a court of equity, as administrative orders were enforced, and that the liability for the damages actually sustained by a shipper, by reason of a violation of the law, could, conformably to the seventh amendment of the Constitution, only be enforced, as are other liabilities of that kind, by a suit at common law. This recognition by Congress of the necessity of conforming to the requirements of the seventh amendment, is, of course, inconsistent with any interpretation of the ninth section, from which it could be inferred that a person claiming to be damaged by any common carrier might "elect" to pursue his claim for damages before the commission, as his final and efficient remedy, and procure an award for the payment of the same, enforceable as such in a court of law, as an administrative order is enforceable in a court of equity. The
 313 successive amendments by which section 16 was brought into its present shape, attest the earnest purpose of Congress to meet the situation. Suits to enforce the liability created by section 8 were made available to the person injured in all cases, not only where the violation of the statute was an act or practice denounced as illegal by the law itself, but also where such act or practice was only made illegal by the finding of the commission.

Sections 13 and 15 having provided that the commission was authorized, either upon complaint or upon its own initiative, to declare, upon investigation, any rates or practices unjust or unreasonable, section 16 provided for a case where, after the complaint and investigation, an award, or, as it was called in the original act, a

recommendation, of damages was made by the commission. If not complied with by the defendant within a time specified, the complainant was authorized to file in a Circuit (District) Court of the United States, or in any state court of general jurisdiction, a petition setting forth briefly the causes for which he claims damages and the order of the commission in the premises. "Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages." This is in effect authorizing in the special case described a common law suit for damages, as contemplated by sections 8 and 9, in all cases where damages are claimed consequent upon a violation of the law.

It is true, that the law makes an exception to the ordinary rule of evidence in such cases, by providing that facts stated in the findings or order of the commission need not again be proved by the plaintiff, the finding and order being made *prima facie* evidence of such facts. Such facts may or may not be relevant to the question of the liability for, or amount of, damages claimed. Their evidential value in this respect is for the court and jury trying the case. This

314 *prima facies* of the facts found is an advantage of considerable moment to the plaintiff. It is an expressed exception to the ordinary rule of evidence, and should not be extended by implication. It must be confined to the precise meaning of the language of its enactment. If the intent of the legislative mind had been to go further and make, not only the findings of fact and order *prima facie* evidence of the facts stated, but also the conclusions of the commission on facts, *prima facie* evidence of the liability of the defendant for the amount of damages stated in the award, such intent should and would have found expression in the act. We are not to impute to Congress such an intention so violative of the fundamental rights of the parties to a suit at common law, and of the express guaranty of the Constitution in that regard. If more were wanted, we might refer to the language of section 14, which emphasizes the distinction between the "conclusions" of the commission and "the findings of fact on which the award is made."

The distinction between reparation and non-reparation cases, so anxiously made by Congress, in order to conform to the spirit of the seventh amendment, would be practically nullified, if, in prosecuting a suit for damages actually sustained by reason of a violation of the law, the liability for such damages, and the amount thereof, as found by the commission, must be conceded in the first instance. Is a defendant to be called upon, practically to prove a negative, and show that the plaintiff was not damaged, or that the amount claimed was less than that stated by the commission? These facts, or the facts upon which they depend, are all peculiarly within the knowledge of the plaintiff, and it is fundamental that neither party to a suit should be required to prove or disprove what is peculiarly within the knowledge of the opposite party.

Unwarranted as this contention may be, that the findings
315 and order of the commission are *prima facie* evidence, not only of the facts therein stated, but of the conclusions of the commission in regard to the very subject-matter in litigation, it

is also still more unjust in these cases, because if sustained, it practically and substantially makes the award of the commission, not only *prima facie*, but conclusive evidence of the plaintiff's case.

The theory of the case, as presented by the defendants in error in their pleadings, as well as at the trial, and adopted by the court below, is that the suit was brought upon the award, *qua* award, instead of having been brought "to enforce a cause of action given by this section (section 8) to any person injured." It was brought to recover what, though called damages, would really be a penalty. In accordance with this theory, plaintiff's contention logically follows that, when the commission finds that the rates charged were unreasonable, and what the reasonable charge should have been, the establishment of these facts entitles the shipper, as matter of law, to recover the difference between the two rates. In the present case we have the unquestioned finding of the commission, that the rates charged were unreasonable, and that a certain lower rate was reasonable, and the difference between the two was expressly and avowedly awarded as damages to the plaintiff. Defendants in error contend that the court below erred in awarding the difference between the two rates, and the court below states that the so-called facts, when shown at the trial, constitute a *prima facie* case for the plaintiff. If, however, the difference between the two rates is, as matter of law, the measure of damage sustained by the plaintiff, it is not only *prima facie* but conclusive evidence upon court and jury of the injury to the plaintiff and of the amount of damage to which he is entitled. Grant the premise, that plaintiff is entitled to recover, as matter of law, the difference between a reasonable and unreasonable

316 rate found by the commission, and that the suit is for the recovery of that difference, as awarded by the commission, the logical conclusion is, as stated by the defendants in error and the court below. This "logical conclusion," however, is a *reductio ad absurdum*, and therefore shows the falsity of the premises upon which it is founded.

Congress admittedly, by its successive amendments to the act of 1887, sought to conform to the requirement of the seventh amendment, by providing that, where the matters involved were found upon a controversy requiring a trial by jury, such a trial should be accorded. Can it be doubted that the parties, therefore, are entitled to a real trial by jury, so conducted as to accord to them in measure the enjoyment of their constitutional right? If so, how wide of the truth is the contention that this right has been enjoyed by the defendant in the present suit?

We have already quoted one form in which the theory of the case is stated by the plaintiff below. In another place in his supplemental brief, it is thus stated:

"At common law, a shipper who had been charged unreasonable rates could recover the overcharge; and, under the statute, as so amended, as the commission had determined that there had been an overcharge, the shipper could recover in the same way, although, in the course on the trial the carrier was at liberty to disprove, if it could, the fact of the overcharge established *prima facie* by the finding in order of the commission."

The "overcharge," as has been before stated in the same brief, can be nothing else than the difference between the reasonable and the unreasonable or tariff rate. How can the carrier be said to be "at liberty" to disprove that arithmetical fact? This difference, according to the theory of the court below,—though its payment has neither been "extorted" or "coerced," except by the law—is
317 the damage to which the plaintiff is entitled as a matter of law. Though stated to be *prima facie*, it is really, according to that theory, conclusive as to the injury of the plaintiff and the amount of his damage.

We need only for a moment compare this theory of a suit for damages with that which is established by the act itself. The sixteenth section nowhere says that the report, findings or order of the commission are *prima facie* evidence of the liability of the defendant, or of the amount of such liability. It only says, and we must again recur to its exact language, that the findings and order of the commission "shall be *prima facie* evidence of the facts therein stated." But clearly, such facts are not made *prima facie* evidence of anything. Their evidential value is for the court and jury to determine. They may or may not be sufficient to make a *prima facie* case, or they may, in the opinion of the court or jury, be of any other greater or less degree of probative force. These facts can be no other than those referred to in the fourteenth section, where it provides that, after an investigation, the committee shall make a report, "which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

In view of this, it would seem almost an abuse of language to say that the "facts," of which the findings and order of the commission are *prima facie* evidence, include the conclusions arrived at by the commission, as to the injury of the plaintiff and the amount of damages sustained. The measure of damage is not fixed by the statute to be the difference between a reasonable and an unreasonable rate, as a matter of law or otherwise. On the contrary, the eighth section declares that the "common carrier" in this case, as in all
318 others, "shall be liable to the person or persons injured for the full amount of damages sustained in consequence of any violation of the provisions of the act." What those damages may be, is a question of fact to be determined by the jury, and not a question of law. That is distinctly decided by the Supreme Court in the International Coal Mining case. This is the measure of damage established by the act itself, and must be conformed to in a case like the present. The language of the eighth section makes the measure of damage therein prescribed applicable to every violation of the act. Nor has the Supreme Court in any case decided otherwise. Its reasoning as to the measure of damages established by the eighth section, is also applicable to every violation of the act,—to one that depends for its illegality upon a finding of the commission, as well as to one where such finding is unnecessary. The argument to the contrary is largely technical, and tends to make a mockery of the right to a jury trial and to defeat the just purposes of the act in that respect.

We conclude by quoting again the language of the Supreme Court in the International Coal Company case, after referring to what said by that court in *Parsons vs. Railway*:

"Congress had not then and has not since, given any indication of an intent that persons not injured might nevertheless receive what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

Our opinion, therefore, already filed, with certain modifications in the text thereof, will stand as the opinion of the court in this regard.

For obvious reasons, we have made no distinction between the count for the recovery of damages for discriminatory rates and for unreasonable rates, and therefore have not referred to the former in the plaintiff's petition, complaining of discriminations alleged to have been practiced by the plaintiff in and during the period from November, 1900, to August, 1901, although the counsel for defendants in error says in his brief at the relevant point: "There is a wide distinction between the two causes of action."

But it is argued that, inasmuch as, upon application of the plaintiff, a discrimination was found by the commission to have been practiced by the defendant, and reparation therefor awarded, in the amount of the difference between the tariff rate charged and the rate collected from other shippers, that award was prima facie evidence of the damage sustained by the plaintiff. So that, according to this argument, even in rebate cases there is a class, consisting of those in which the commission has intervened and made an award to which the measure of damage established by section 8 for a violation of the law, does not apply.

Defendants in error also urge that this court was in error in its interpretation of the second paragraph of section 16 of the act, providing that "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

We have carefully reconsidered the opinion we have already expressed as to this provision of the sixteenth section of the act, in the light of the able argument of counsel for defendants in error. We are not convinced, however, that we have misconceived the meaning and spirit of that provision, and therefore adhere to our judgment, that the court below was in error in instructing the jury that "there is no statute of limitation which bars the recovery of the plaintiff for either of the amounts claimed in this suit." The assignments of error in this respect, therefore, must be sustained, and for these reasons and those heretofore stated, the judgment below must be reversed, and a venire de novo awarded.

(Received and filed February 19, 1914. Saunders Lewis, Clerk.)

- 321 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1721 (List No. 72).

LEHIGH VALLEY RAILROAD CO., Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker and Company, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and a venire de novo awarded.

(Signed)

JOHN B. McPHERSON,

Circuit Judge.

Philadelphia, February 19, 1914.

Endorsed: No. 1721. Order Reversing Judgment. Received & Filed Feb. 19, 1914. Saunders Lewis, Jr., Clerk.

- 322 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, act:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Lehigh Valley Railroad Co., Plaintiff in Error, vs. Henry E. Meeker, Surviving Partner of the firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the trade name of Meeker and Company, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this tenth day of March, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,

Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

323 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Lehigh Valley Railroad Company is plaintiff in error and Henry E. Meeker, Surviving Partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, is defendant in error, No. 1721, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed
324 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

325 [Endorsed:] File No. 24,151. Supreme Court of the United States, No. 1000, October Term, 1913. Henry E. Meeker, Surviving Partner, etc., vs. Lehigh Valley Railroad Company. Writ of Certiorari.

326 In the United States Circuit Court of Appeals for the Third Circuit.

HENRY E. MEEKER, Surviving Partner, etc.,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

It is hereby agreed and stipulated between counsel for the plaintiff in error and the defendant in error in the above case, that the certified copy of the record therein from the Circuit Court of Appeals, presented to the Supreme Court with the petition for certiorari, may be taken as a return to the writ of certiorari, instead of requiring the certification to the Supreme Court of another transcript of said record.

Dated at Philadelphia, Pa., this first day of May, 1914.

HENRY E. MEEKER,

Surviving Partner, etc.,

(Signed)

By WM. A. GLASGOW, JR., *Attorney.*
LEHIGH VALLEY RAILROAD
COMPANY,

(Signed)

By JOHN G. JOHNSON, *Attorney,*
Per J. W. BAYARD.

Endorsed: No. 1721. Stipulation. Received & Filed May 6, 1914. Saunders Lewis, Jr., Clerk.

327 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, et.:

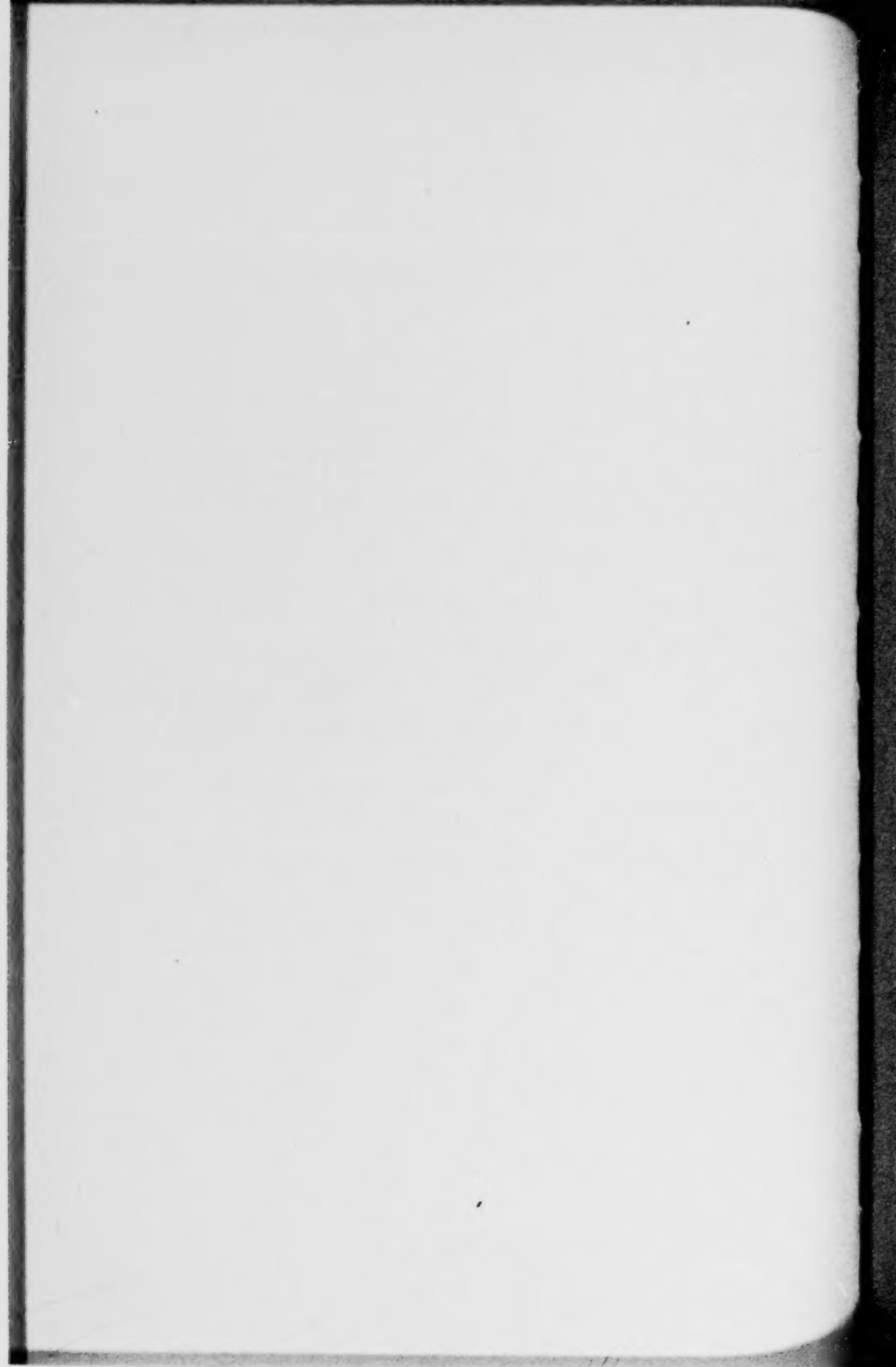
I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed as to return to writ of certiorari to the Supreme Court of the United States, in the case of Henry E. Meeker, Surviving Partner, etc., vs. Lehigh Valley Railroad Company, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this seventh day of May in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

328 [Endorsed:] File No. 24,151. Supreme Court U. S., October term, 1914. Term No. 434. Henry E. Meeker, Surviving Partner, etc., Petitioner, vs. Lehigh Valley Railroad Company. Writ of certiorari and return. Filed May 8, 1914.



TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 435.

HENRY E. MEEKER, PETITIONER,

vs.

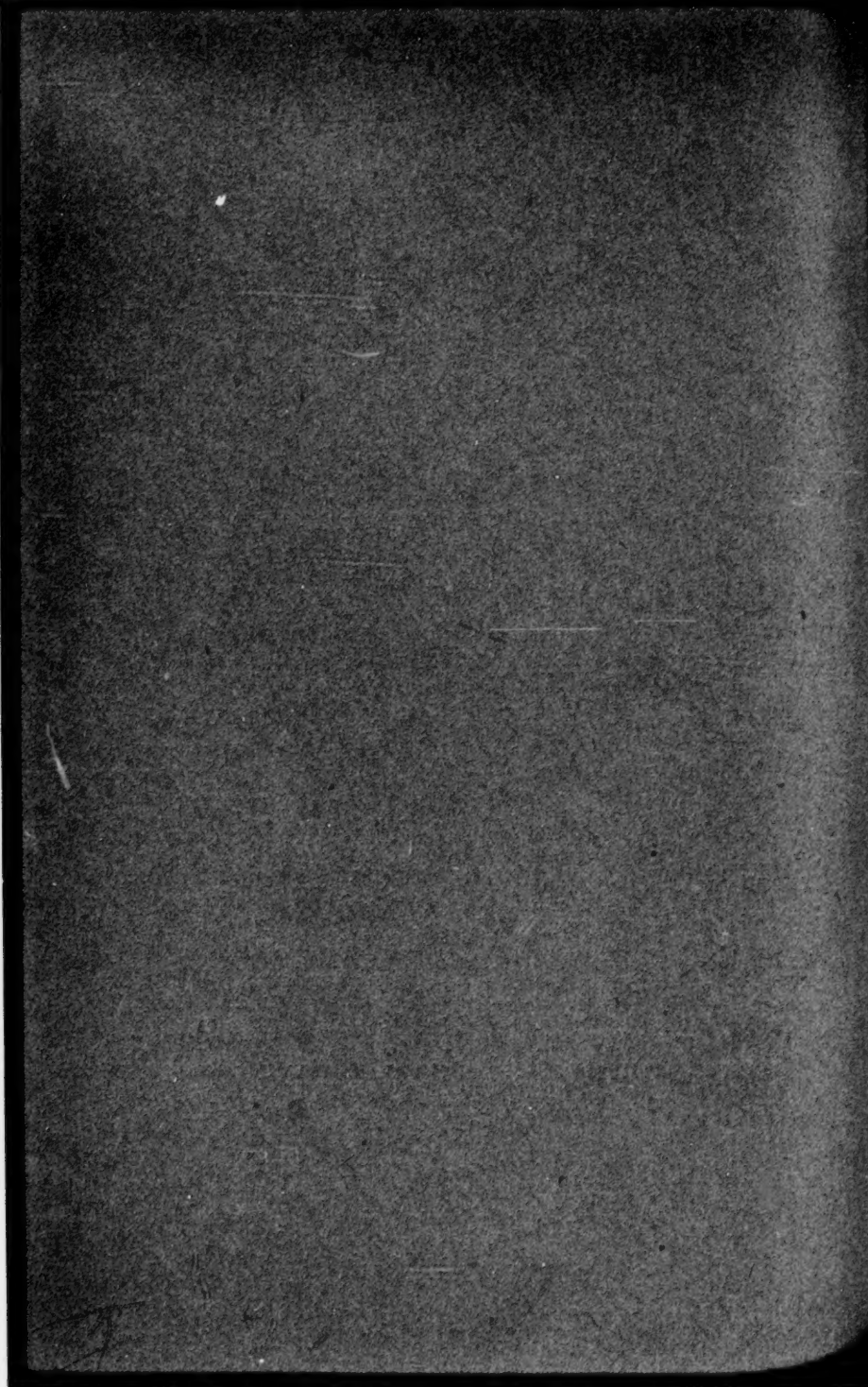
LEHIGH VALLEY RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 9, 1914.

CERTIORARI AND RETURN FILED MAY 8, 1914.

(24,152)



(24,152)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 435.

HENRY E. MEEKER, PETITIONER,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

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Transcript of Record.

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff-in-Error,

vs.

HENRY E. MEEKER, Defendant-in-Error.

In Error to the District Court of the United States for the Eastern
District of Pennsylvania.

1

Docket Entries.

September Session, 1912.

2148.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

John A. Garver, Wm. A. Glasgow, Jr.

Edgar H. Boles, John G. Johnson.

- | | | |
|-----------------|-----|---|
| 1912, September | 3. | Petition filed.
Order directing defendant to plead, answer
or demur filed. |
| " " | 4. | Proof of service of copy of order to plead,
etc., filed. |
| " October | 5. | Plea filed. |
| " " | 8. | Order to place case on trial list filed. |
| " " | 23. | Order for the appearance of Edgar H. Boles,
and John G. Johnson, Esquire, for de-
fendant, filed. |
| " November | 12. | Jury called.
Verdict for plaintiff, Thirteen Thousand One
Hundred and Sixty-one and 78-100 —
(\$13,161.78). |
| " " | 14. | Plaintiff's Bill of Costs filed.
Defendant's motion and reasons for new
trial filed. |
| " December | 19. | Argued sur motion for new trial.
Order refusing motion for new trial and
directing allowance of counsel fees filed.
Præcipe for judgment filed. Judgment ac-
cordingly. |

2

Judgment filed.

“

“

30.

Bill of Exceptions filed.

Assignments of Error filed.

Petition for writ of error filed.

Order allowing petition for writ of error filed.

Bond sur writ of error, in sum of Twenty six Thousand Three Hundred Twenty-three and 56-100 Dollars filed.

Order approving bond sur writ of error filed.

Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.

Citation allowed and issued.

Stipulation for record sur writ of error filed.

1913, January

3.

Citation returned, service accepted and filed.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Henry E. Meeker, plaintiff, and Lehigh Valley Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Lehigh Valley Railroad Company, as by its complaint appears. We being willing that error,

3 if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable James B. Holland, Judge of the United States District Court, at Philadelphia, the 30th day of December, in the year of our Lord, one thousand nine hundred and twelve.

[SEAL.]

GEORGE BRODBECK,

Deputy Clerk of the Circuit Court of the United States.

Before Holland, J.

Allowed by the Court.

Attest:

GEORGE BRODBECK,

Deputy Clerk.

4 In the District Court of the United States for the Eastern
District of Pennsylvania, September Sessions, 1912.

No. 2148.

HENRY E. MEEKER, Petitioner,
vs.
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

Petition.

Filed Sept 3, 1912.

To the Honorable the Judges of the District Court of the United
States for the Eastern District of Pennsylvania:

Your petitioner, Henry E. Meeker, humbly complaining shows
your Honors:

I.

Your petitioner is lawfully and rightfully entitled to receive and
does hereby claim of the Lehigh Valley Railroad Company, the de-
fendant above named, the sum of Ten Thousand, Eight Hundred
and Thirteen Dollars and Sixty cents (\$10,813.60), with interest at
the rate of six per cent. (6%) per annum on said sum from Septem-
ber 1, 1911, to July 15, 1912, amounting to Five Hundred and
Sixty-seven Dollars and Five Cents (\$567.05); also the sum
5 of One Thousand, Five Hundred and Twenty-Six Dollars and
Fifty-three Cents (\$1,526.53); being an aggregate of Twelve
Thousand Nine Hundred and Seven Dollars and Eighteen Cents
(\$12,907.18), with legal interest thereon from July 15, 1912, as-
and for damages and reparation in accordance with a report and order
of the Interstate Commerce Commission, dated May 7, 1912, No.
3235, Opinion No. 1880, a copy whereof is hereto attached, marked
"Exhibit A", and prayed to be made and read as a part hereof, and
in accordance with the several Acts of Congress in such case made
and provided; and the petitioner shows that the defendant justly
and legally owes to petitioner the sum above set forth, together with
legal interest from July 15, 1912, and a reasonable attorney's fee to
be taxed as part of the costs against defendant.

II.

The petitioner is a citizen and resident of the City of New York
and State of New York, and, on and before April 13, 1908, was and
still is engaged in the business of buying, selling and shipping
anthracite coal under the trade name of Meeker & Company, hav-
ing duly succeeded to the business which for many years was carried
on by himself and Caroline H. Meeker under the same name. The
said business involved the shipping of large quantities of anthracite
coal over the lines operated by the defendant, from mines and

collieries situated in what is known as the Wyoming coal region Pennsylvania to tidewater at Perth Amboy, N. J., and thence to the New York market.

At all the times herein mentioned, the defendant was, and still is, a railroad corporation organized and existing under the laws of the State of Pennsylvania, and its road runs through the Eastern Judicial District of Pennsylvania and also it is a common carrier

engaged in interstate railroad transportation of passengers and property between points in the States of Pennsylvania

New Jersey and New York, over its own lines of road, as well as over other lines owned, leased, controlled or operated by it, and has its principal operating office in the Eastern Judicial District of Pennsylvania aforesaid.

III.

From August 1, 1901, the defendant, which, prior to 1901, had not charged for transporting coal more than the difference between the market price of the coal at the breakers and the price at tidewater, although it had been publishing nominal tariff rates, began to exact and on and after April 13, 1908, and until April 13, 1910, exacted from all independent shippers a fixed charge per ton for carrying coal to tidewater, amounting to \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 for coal smaller than buckwheat coal; and the said charges have ever since been continued, except that the rate for buckwheat coal was reduced from \$1.25 to \$1.20 per ton on January 10, 1909. The said charges were unjust, unreasonable and discriminatory and were forbidden by the Act to Regulate Commerce and particularly by Sections One and Three thereof.

As a result of the said excessive and unreasonable charges, the complainant was obliged to pay excessive rates upon all coal shipped by him to tidewater over the lines of the defendant.

The complainant was unable to continue his shipments of anthracite coal, except by complying with the demands of the defendant as to rates; and all his said payments were made under duress; and the complainant, in each and every case, made the said payments under protest, asserting that the rates charged were unreasonable and excessive, and notified the defendant that he reserved the right to recover back from it the amount of excess over the reasonable rate.

7

IV.

From April 13, 1908, to April 13, 1910, the proper and reasonable charge for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, New Jersey, was not to exceed \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat coal. During said period, from April 13, 1908, to April 13, 1910, complainant shipped from said Wyoming coal region to Perth Amboy, New Jersey, forty-six thousand, seven hundred seventy-two and two one-hundredths (\$46,772.02) tons of coal of prepared sizes; twenty-six thousand, nine hundred seventy-two

and six one-hundredths (26,972.06) tons of pea coal, and twenty-two thousand, four and nine one-hundredths (22,004.09) tons of buckwheat coal, which said charges above set forth have been found and fixed by the Interstate Commerce Commission as the reasonable rates for the carriage of coal between the said points of origin and destination. During said period, however, and between said points of origin and destination, the defendant unjustly and unreasonably charged petitioner rates in excess of the rates above named, amounting to \$1.55 per ton for prepared sizes, \$1.40 per ton for pea coal, and \$1.25 per ton for buckwheat coal, which charges were continued during the whole of said period, and have been declared unjust and unreasonable, so far as they exceeded the rates fixed as aforesaid, by the Interstate Commerce Commission in its report and opinion No. 1880, Docket No. 3235, "Exhibit A", hereto attached, and subjected petitioner to loss and damage by excessive and unreasonable charges, as in this petition and in said report of the Interstate Commerce Commission aforesaid set forth.

V.

8 The petitioner, on April 13, 1910, filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices and charges of defendant to the prejudice of petitioner, and in violation of the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory and supplementary thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order requiring defendant to cease and desist from such practices, and fixing the rate for transportation of anthracite coal between the Wyoming coal region and Perth Amboy, New Jersey, awarding complainant reparation in damages to such an amount as said complainant had suffered loss by reason of the unjust and unreasonable charges of defendant. Defendant, being duly served with a copy of said complaint, made answer thereto; issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and a finding resulted, duly filed and reported by the Interstate Commerce Commission, at a general session at its offices in Washington, D. C., on Docket No. 3235, Opinion No. 1880, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and filed as "Exhibit A" in this case, and made a part of this petition. The said finding was regularly and properly made, ordering the defendant to make reparation to petitioner, as in Paragraph I, of this petition above set forth. In the said finding the opinion and conclusions of the Interstate Commerce Commission were expressly based upon another certain finding and opinion, filed by said Commission on June 8, 1911, in No. 1180, Opinion No. 1585, another proceeding instituted by petitioner as surviving partner of the firm of Meeker & Company, arising upon identical facts and alleging like unjust and unreasonable charges and practices during the period from August 1, 1900, to July 1, 1907, a copy of which said opinion, with the conclusions and

orders of the Commission, is hereto appended, and prayed
9 be made and read as a part of this petition, and is marked
"Exhibit B."

VI.

Petitioner avers that a true copy of the aforesaid order of Interstate Commerce Commission, dated May 7, 1912, Docket No. 3235, Opinion No. 1880, was duly served upon defendant in the above entitled cause, and demand made that defendant pay petitioner the sum claimed in this petition, and as set forth in the aforesaid order of the Commission, "Exhibit A," hereto attached, but that defendant has wholly failed, neglected and refused to pay the sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf, to petitioner or any one on his behalf. Wherefore petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory or supplementary thereto.

Wherefore, the said petitioner, Henry E. Meeker, respectfully prays:

First. That your Honorable Court enter a rule and order upon the said defendant, the Lehigh Valley Railroad Company, to file its plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second. That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

Third. That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

10 Fourth. That your Honorable Court will enter judgment in favor of petitioner and against the said defendant, the Lehigh Valley Railroad Company, for the sum of Twelve Thousand Nine Hundred and Seven Dollars and Eighteen Cents (\$12,907.18) as hereinbefore set forth, with legal interest thereon from July 1912, and costs, including a reasonable attorney's fee.

Fifth. That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or to your Honorable Court may seem meet.

And your petitioner, as in duty bound, will ever pray, etc.

HENRY E. MEEKER

STATE OF NEW YORK,

County of New York, ss:

Henry E. Meeker, being duly sworn, deposes and says that he is the petitioner in the above entitled cause, and that the facts set forth in the foregoing petition are true and correct, to the best of his knowledge, information and belief.

HENRY E. MEEKER

Sworn and subscribed to before me this 30th day of August, A. D. 1912.

[SEAL.]

_____,
Notary Public.

Notary Public, Kings County No. 1. Certificate filed in New York County No. 1. Kings County Register's No. 2529. New York County Register's No. 4028. Commission expires March 30, 1914. Customs Notary.

11

No. 11188.

STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That Henry J. Dorgeloh has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 31st day of August, 1912.

WILLIAM F. SCHNEIDER, *Clerk.*

"EXHIBIT A."

Opinion No. 1880.

Interstate Commerce Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners,
Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 3235.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners,
Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 3235.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Submitted February 27, 1912; Decided May 7, 1912.

Reparation awarded on account of unreasonable and discriminatory
rates charged for the transportation of anthracite coal from the
Wyoming region in Pennsylvania to Perth Amboy, N. J., in13 accordance with the conclusions announced in Meeker vs.
L. V. R. R. Co., 21 I. C. C., 129.

William A. Glasgow, Jr., for complainants.

Frank H. Platt, George W. Field and E. H. Boles, for defendant.

Supplemental Report of the Commission.

McCHORD, Commissioner:

The original report in No. 1180, 21 I. C. C., 129, disposed of all
the questions at issue except the claim for reparation, and the case
was held open for the purpose of securing further information re-

garding that feature. A further hearing has been held, and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct.

In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory, in violation of section 2 of the act to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat.

On basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911.

With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the Commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation upon

15 shipments which moved between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report.

In No. 1180 the complaint attacked the reasonableness of rates charged by defendant for the transportation of various sizes of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., and asked reparation. On June 8, 1911, the Commission rendered its decision in that case. The petition in the present case was filed on April 13, 1910, or about a year prior to our decision in No. 1180. As before stated, it attacks the same rates that were found unreasonable in No. 1180, and asks reparation on shipments moving from July 17, 1907, to April 13, 1910.

The former case was filed with the Commission within one year from the passage of the law of June 29, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is, therefore, subject to the two-year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case must be denied.

On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth, 46,772.02 tons of coal of
16 prepared sizes, 26,972.06 tons of pea coal and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to \$136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and \$125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60, with interest amounting to \$1,526.53 upon the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911.

The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved.

Orders will be issued in accordance with the findings herein announced.

Orders.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 7th Day of May, A. D. 1912.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

17 This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent. per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

18 No. 3235.

HENRY E. MEEKER

v.

LEHIGH VALLEY RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full in-

vestigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$10,813.60. with interest at the rate of 6 per cent. per annum, amounting to \$1,526.53 upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 1, together with interest at the rate of 6 per cent. per annum on said sum of \$10,813.60 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

* By the Commission.

[SEAL.]

JOHN H. MARBLE, *Secretary.*

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"EXHIBIT B."

Opinion No. 1585.

Before the Interstate Commerce Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Decided June 8, 1911.

Report and Order of the Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Submitted May 15, 1911. Decided June 8, 1911.

1. Upon shipments of anthracite coal made by complainants from the Wyoming region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, the rates collected by defendant were unjustly discriminatory and resulted in damage to complainant, for which reparation will be awarded.

2. Defendant's present rates for the transportation of anthracite coal in carloads from the Wyoming region in Pennsylvania to Perth Amboy, N. J., of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20 on buckwheat coal, found unreasonable to the extent that they exceed \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat coal, which latter rates are established as maxima for the future, reparation to be awarded on basis of the latter rates as to shipments made by complainants since August 1, 1901.

William A. Glasgow, Jr., and John A. Garver for complainants.
J. F. Schaperkottter, Frank H. Platt and George W. Field for defendant.

Report of the Commission.

McCHORD, Commissioner:

Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, complainants in this proceeding, were, when the complaint was filed, engaged in the business of buying, shipping and selling anthracite coal over the lines of the Lehigh Valley Railroad Company from mines and collieries situated in the Wyoming coal region of Pennsylvania to tidewater at Perth Amboy, N. J., and thence to the New York market.

During the pendency of the proceeding Caroline H. Meeker died, and it has been continued to be prosecuted in the name of the surviving partner, Henry E. Meeker.

Complainants were not mine operators, but merely dealers on the New York market. The coal shipped by them to Perth Amboy was purchased from the Stevens Colliery, which is situated near the city of Wilkes-Barre, Pa., on the West Pittston branch of defendant's Wyoming Division, 1.5 miles from Coxton and 165 miles from Perth Amboy.

21. Practically all the anthracite coal deposits in the United States are in nine counties in the eastern portion of Pennsylvania, in an area comprising about 496 square miles. The different coal fields are as follows: The northern, commonly called the Wyoming, from which the shipments involved in this proceeding were made; the eastern middle and western middle, which together are known as the Lehigh regions, and the southern, which also bears the name of Schuylkill. All three regions are reached by the Lehigh Valley Railroad. The northern field is some 55 miles in length, has a maximum width of about 5 miles, and lies northwesterly of the Pocono Mountains, in the valley of the Lackawanna and Susquehanna Rivers. From this valley the carriers find comparatively easy outlets to points north and west, along the rivers mentioned, but coal shipped to the east over defendant's line has to be carried over the mountains at a maximum elevation of 1,750 feet. The lowest portions of the valley are about 500 feet above the level of the sea.

The coal mines are usually located at points separated from carrier's main tracks by distances varying from a fraction of a mile

to several miles, and connected with such tracks by lateral lines called branches or spurs. These branches are sometimes constructed by the mine operators, but generally by the carriers. The manner in which the coal is handled at the mine openings and while in process of transportation is as follows: For convenience in handling the coal at the mouths of the mines and preparing it for market, buildings called "breakers" are erected, and in these buildings the large lumps are broken and the coal separated into required sizes by being run over a series of screens of appropriate mesh. Some lump coal is taken as it comes out of the mine and is marketed for use either in furnaces or locomotives, but the demand for this size is limited. The sizes usually transported are the following:

22 Broken or grate, which goes through a mesh 4 inches square and over a mesh $2\frac{3}{4}$ inches square.

Egg, which goes through a mesh $2\frac{3}{4}$ inches square and over a mesh 2 inches square.

Stove, which goes through a mesh 2 inches square and over a mesh $1\frac{3}{8}$ inches square.

Chestnut, which goes through a mesh $1\frac{3}{8}$ inches square and over a mesh three-fourths inch square.

Pea, which goes through a mesh three-fourths inch square and over a mesh one-half inch square.

Buckwheat No. 1, which goes through a mesh one-half inch square and over a mesh one-fourth inch square.

Buckwheat No. 2, or rice, which goes through a mesh one-fourth inch square and over a mesh one-eighth inch square.

Smaller sizes are known as buckwheat No. 3 and culm.

The sizes above pea are known as prepared sizes and are used principally for domestic purposes. The smaller sizes are used almost entirely for steam purposes.

Formerly the smaller sizes had no commercial value and were allowed to accumulate as waste product in banks at the mines. But changes made in the grates of furnaces have facilitated their use for steam purposes, and such use has been increasing rapidly during recent years. By means of "washeries" large quantities of the smaller sizes have been recovered from these waste or culm banks and sent to market to satisfy this increased demand. However, only comparatively small prices can be obtained for these smaller sizes.

The cars are loaded directly from the breakers by means of chutes. The loaded cars are then hauled to a convenient place of concentration along the main track, designated a gathering or assembly

23 point, where they are drilled into trains according to destination and with some reference to the sizes. The coal destined to tidewater points is hauled in trains to yards adjacent to the docks, where a more particular separation takes place; that is to say, coal of particular qualities and sizes is placed on separate tracks and afterwards transferred to the boats or storage bins in accordance with the requirements of different purchasers.

For the year ended June 30, 1908, the Lehigh Valley Railroad Company carried altogether 11,206,774 gross tons of anthracite coal, upon which its gross revenue was \$14,908,923.08, showing an aver-

age revenue of \$1.2411 per gross ton, or \$0.00737 per net ton per mile. During the same period the Lehigh Valley's entire freight revenue amounted to 23,643,001 gross tons, its gross revenue to \$30,186,581.72, its average rate per gross ton to \$1.277, and its average rate per net ton per mile on all traffic, including anthracite coal, to \$0.00630. It will thus be seen that during 1908 anthracite coal constituted approximately 47 per cent. of defendant's freight tonnage and produced approximately 49 per cent. of its freight revenue. Complainants shipped, between August 1, 1901, and June 30, 1907, 499,901.47 gross tons of anthracite coal, upon which they paid total freight charges of \$709,637.67, resulting in an average rate per net ton per mile (based on the average mileage from the Wyoming region to Perth Amboy of 170 miles) of \$0.00745.

It appears that prior to 1900 various anthracite coal carrying railroads in Pennsylvania, in their endeavor to control the output and sale of anthracite coal, had formed other and distinct corporate organizations, usually known as "coal companies," but which through stock ownership were owned, officered and controlled by the railroads which brought them into existence. Such was the relation that existed between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company. The function of the Lehigh

Valley Coal Company was to acquire, hold and operate vast
24 tracts of anthracite coal lands, and to make contracts with independent operators for their entire output. In connection with the purchase of coal from independent operators there came into existence what are known as "percentage contracts." The Lehigh Valley Coal Company regularly for a period of years entered into such contracts with independent coal operators along the line of the Lehigh Valley Railroad. Under these percentage contracts the Lehigh Valley Coal Company agreed to pay the independent operators fluctuating prices for their coal at the mines, to be arrived at on the basis of certain percentages of the average market prices of the various grades of anthracite coal at tidewater. An accurate check was kept on the tidewater market prices, and monthly settlements were made. Under the contract which was in effect during the greater part of the year 1900, the agreement by the Lehigh Valley Coal Company was to pay the coal operator 60 per cent. of the tidewater price on the highest grade of anthracite coal and lesser percentages on the lower grades. This contract was therefore called the "60-per-cent. contract," due to the fact that that percentage figure applied on the highest grade of coal.

Although the Lehigh Valley Railroad Co. was not nominally a party to any of the percentage contracts entered into by the Lehigh Valley Coal Company, yet it made a practice of settling for the freight charges on coal purchased and shipped by the Lehigh Valley Coal Company at the differences between the amounts paid to the coal operators and the average market prices at tidewater. The result therefore was, taking the highest grade of coal as an illustration, that if the Lehigh Valley Coal Company paid the independent operator 60 per cent. of the tidewater price, the Lehigh Valley Railroad Company transported the coal for 40 per cent. of said tide-

water price. It will thus be seen that, although the matter of freight rates was not mentioned in the contracts made by the Lehigh Valley Coal Company with the independent operators, yet the freight rates were directly dependent upon said contracts.

It appears that if an independent coal operator lacked established business connections or capital, it was to his interest to enter into the percentage contract with the Lehigh Valley Coal Company. Meeker & Company, however, had been in business as sales agents for coal since 1889, and their facilities for selling were adequate. They therefore made a contract with the Stevens Coal Company for practically their entire output of coal. There were also a number of other shippers of anthracite coal over the lines of the Lehigh Valley Railroad, and in order to place them on an equality with the Lehigh Valley Coal Company, they were accorded the same rates as were accorded to that company.

It was the custom for all shippers, including the Lehigh Valley Coal Company, to pay the tariff rates on the various grades of anthracite to tidewater, and then by means of monthly settlements be given the benefit of the rates upon the percentage basis, which rates were known as "adjusted rates," and were usually considerably lower than the tariff rates; but which at certain periods, owing to advancing prices of anthracite coal, were higher than the tariff rates. The general purpose of the adjusted rates was, however, to give the shippers the benefit of rates lower than the tariff rates, and, upon the whole, they accomplished this result, and the evidence shows that they were impartially applied on all shipments during the greater part of the time that they were in effect.

In November, 1900, the parties interested (i. e., the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company and the coal producers) began to consider making a change in the terms of the then existing 60-per-cent. contract. It seems that the subject was not of easy solution, and that the negotiations dragged along for nine months, until August 1, 1901, at which time an agreement was reached whereby the price of the highest grade of coal at the breakers was to be 65 per cent. of the tidewater market prices, instead of 60 per cent. as formerly, with related increases on the lower grades. From almost the beginning of these negotiations, it seems to have been the understanding of all parties that whatever arrangement was finally reached would be made retroactive until November 1, 1900, the date of the beginning of the negotiations, and that the Lehigh Valley Railroad Company would readjust its freight charges retroactively in conformity with the new scale of prices not only upon shipments made by the Lehigh Valley Coal Company, but upon all coal shipped by independent dealers.

On the first hearing of this case counsel for the Lehigh Valley Railroad Company took the position that the tariff rates had been paid by all coal shippers during the nine months of negotiations; and that when, on August 1, 1901, it was determined that the 65-per-cent. basis should govern retroactively to November 1, 1900,

the extra cost of the coal on this basis was paid by the Lehigh Valley Coal Company to the coal operators. Hence it was argued that the Lehigh Valley Railroad Company, having charged its full tariff rates to all, and the coal company having paid the increased price, there had been no discrimination against Meeker & Company during said nine months. As the evidence in support of this argument was meager and unsatisfactory, a supplemental hearing was had at which additional evidence was asked upon this point. The facts as disclosed by that hearing were as follows:

The Lehigh Valley Railroad Company during the period from November 1, 1900, to August 1, 1901, endeavored to settle with all shippers upon the basis of adjusted rates, under the 60 per cent. contract. During the months of November, December, January,

February and March the adjusted rates upon some of the
27 grades were higher than the tariff rates, owing to the high market price of coal at tidewater. Meeker & Company were expecting the 65-per-cent. contract to be adopted, and believed that the effect of its adoption would be that they would get the benefit of adjusted rates which were lower than the tariff rates, whereas under the 60-per-cent. contract, they were being called on to pay adjusted rates which were in many instances higher than the tariff rates. They protested against paying money to the Lehigh Valley Railroad Company under the 60-per-cent. basis, which they expected to be subsequently refunded when the 65-per-cent. contract was adopted. They therefore objected to settling upon the basis of the 60-per-cent. "adjusted rates," even as early as November and December, 1900, but under some arrangement or understanding with the coal freight agent of the Lehigh Valley Railroad Company, settlements were made for November and December, in order that the books of that company might be closed for the year. Thereafter they refused to settle upon the basis of the 60-per-cent. adjusted rates, even in those instances where settlement would have involved a refund to them from the tariff rate which they had paid. Their idea seems to have been to have nothing whatever to do with settlements upon the 60-per-cent. basis, because they believed the whole matter would have to be subsequently undone and refigured upon the 65-per-cent. basis.

During the earlier months of 1901, owing to the market prices of coal, the adjusted rates upon the 60-per-cent. basis were in the main higher than the tariff rates; but in April, May and June, and possibly thereafter, owing to the lower prices of coal, the adjusted rates became less than the tariff rates. The evidence does not clearly show whether independent shippers, other than Meeker & Company, paid the adjusted rates, when they were higher than the tariff rates, but the presumption is that some of them at least
28 did so. It appears, however, that shippers other than Meeker & Company accepted refunds from the Lehigh Valley Railroad Company, in such instances as the adjusted rates were lower than the tariff rates.

When it was finally determined, on August 1, 1901, to adopt the 65-per cent. contract, the Lehigh Valley Railroad Company made

a systematic effort to pay back to all shippers, including the Lehigh Valley Coal Company, such amounts as may have been paid during the period November 1, 1900, to August 1, 1901, in excess of the tariff rates. There was not, however, at that time any attempt made to collect back from shippers refunds which may have been made to them from month to month when the "adjusted rates" were lower than the tariff rates. It thus appears that the attempted readjustment to basis of tariff rates which the Lehigh Valley Railroad Company sought to make upon the adoption of the 65-per-cent. contract was only partial. Meeker & Company were offered refunds of the excess over tariff rates which had been paid in November and December, 1900, but refused to accept the same, stating in a letter of refusal that they would insist upon settlement of freight rates upon the basis of the newly adopted 65-per-cent. contract.

This brings us to the contention of complainants that the payment of the increased retroactive prices to the coal producers by the Lehigh Valley Coal Company was in fact a payment by the Lehigh Valley Railroad Company, and therefore equivalent to a readjustment by the latter company of its freight rates upon the basis of the 65-per-cent. contract on such coal as was shipped by the Lehigh Valley Coal Company during the period from November 1, 1900, to August 1, 1901.

Investigation of the books of the Lehigh Valley Railroad Company disclosed the fact that subsequent to August 1, 1901, there were extraordinary cash advances made by that company to the Lehigh Valley Coal Company, and one of the purposes of the supplemental hearing was to ascertain whether said cash advances included the sum which the Lehigh Valley Coal Company paid to the coal operators under the 65-per-cent. contract which was made retroactive for the nine months from November 1, 1900, to August 1, 1901.

On that hearing it developed that at the end of the year November 30, 1898, the Lehigh Valley Coal Company owed the Lehigh Valley Railroad Company \$1,596,650; that at the end of the year November 30, 1899, the amount of its indebtedness remained unchanged; that during the fiscal year November 30, 1899, to November 30, 1900, there was a strike, production was curtailed and sales were made from stored coal, whereby the coal company was enabled to reduce its stock of coal, and its accounts receivable due from customers for coal sold; that as the result of this condition the indebtedness of the coal company to the railroad company, on November 30, 1900, had been reduced to about \$500,000. The unusual advances made by the railroad company to the coal company in 1901 were necessitated by the resumption of mining operations after the cessation of the strike. Counsel for the Lehigh Valley Railroad Company introduced in evidence the following extracts from the annual report of the company to its stockholders for 1901, viz:

Under the existing arrangements, the Lehigh Valley Coal Company is compelled to depend upon the railroad company for working capital to carry on its operations.

* * * * *

The suspension of mining during the period of the strike last year and the sale of the greater portion of coal in stock enabled the coal company to repay to the railroad company a large proportion of the amount advanced by the latter company for this purpose.

30 And counsel for complainant was permitted to read into the record the following additional extract from the same report, viz:

The uninterrupted continuance of operations during the fiscal year just closed (i. e., the year ending November 30, 1901) restored normal conditions, necessitating advances by the railroad company of a million dollars, which amount is more than represented by the increased tonnage and value of the coal in stock as compared with November 1st last.

The general auditor of the Lehigh Valley Railroad Company testified that the amount which the Lehigh Valley Coal Company had to pay the coal operators under the 65-per-cent. contract, which on August 1, 1901, became effective retroactively to November 1, 1900, was \$231,090.19. He further testified that the deficit of \$491,576.65 shown in the operations of the Lehigh Valley Coal Company for the year ended November 30, 1901, would have been less by \$231,090.19 had it not been for the payment by the coal company to the operators of the increased prices under the retroactive 65-per-cent. contract.

In view of the admissions upon the supplemental hearing the conclusion seems inevitable that the financial condition of the Lehigh Valley Coal Company was not such as to have enabled it to pay the \$231,090.19 to the coal operators out of its own treasury, and that not only this amount, but much larger sums, were advanced by the railroad company to the coal company during the year 1901 for the purpose of enabling the latter to carry on its operations.

It is alleged in the petition that between November 1, 1900, and August 1, 1901, complainants, Meeker & Company, shipped 88,336 tons of coal from the Wyoming region to tidewater at Perth Amboy, N. J., a distance of about 165 miles, on which they paid a sum total as freight charges, amounting to \$129,989.18; whereas upon the 35-per cent. basis which complainants contend was the necessary
31 result of the 65-per-cent. contract entered into by the Lehigh Valley Coal Company on August 1, 1901, the freight charges should have been only \$118,867.21, the amount of overpayment by complainants being \$11,121.97.

From the facts disclosed it is apparent that the payment of the \$231,090.19, which was ostensibly made by the Lehigh Valley Coal Company to the coal operators from which it had purchased coal during the period from November 1, 1900, to August 1, 1901, was in fact made from funds advanced as cash by the Lehigh Valley Railroad Company to the Lehigh Valley Coal Company, and was therefore the equivalent of a readjustment of the freight rates upon the basis of the 65-per-cent. contract on such coal as was purchased by the Lehigh Valley Coal Company and shipped to tidewater during the period from November 1, 1900, to August 1, 1901. We are of the opinion and so hold that complainants have sustained the alle-

gation of unjust discrimination under the second section of act. Reparation, with interest from August 1, 1901, will be awarded on this account.

Since August 1, 1901, complainants and other shippers have paid full tariff rates on coal from the Wyoming region to Perth Amboy, which rates are as follows:

	Per gross
Prepared sizes	\$1.55
Pea coal	1.40
Buckwheat coal.....	1.20
Aug. 7, 1904, to Jan. 10, 1905.....	1.25
All sizes below buckwheat.....	1.10

It is alleged in the complaint that any charge in excess of \$1 on all grades subsequent to August 1, 1901, is unreasonable, and reparation is asked by complainants, upon the basis of the suggested rate of \$1, upon all shipments made by them over the Lehigh Valley Railroad during the period August 1, 1901, to July 1, 1907, the aggregate amount of reparation sought during said period being \$210,351.

In a later complaint, filed April 13, 1910, No. 3235, styled Henry E. Meeker vs. Lehigh Valley Railroad Company, complainant sought reparation on the basis of a rate of \$1 on all grades of coal shipped during the period July 1, 1907, to April 1, 1910, alleging a total overcharge during said period of \$55,290.73.

As the subject-matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case.

When complainants filed their complaint in July, 1907, they elected as to the period from November 1, 1900, to August 1, 1901, to rely entirely upon a violation of the second section of the act, and therefore claimed reparation only to the extent of \$11,121.97, on the ground of discrimination during said period in favor of the Lehigh Valley Coal Company, claiming that the effect of the retroactive one per-cent. contract of August 1, 1901, was to readjust upon a low basis the freight rates which had been paid by the Lehigh Valley Coal Company during said period.

When the case came on for hearing in March, 1909, complainant's counsel announced orally before the Commission, and not by way of amendment of their petition, that they desired to claim additional reparation in the sum of \$41,644.82—the excess paid over \$1 per ton during the period from November 1, 1900, to August 1, 1901.

Complainants' counsel stated in his brief filed with the Commission, but not by way of amendment to his petition, that by reason of the fact that the Commission may not be convinced that \$1 per ton is a reasonable rate on all grades of coal to tidewater, he desired to put his claim for reparation in an alternative form, viz: That in event the Commission should not approve the suggested rate of \$1 per ton on all grades of coal, complainants are entitled to reparation in the amount of \$156,144.92, the amount

which the freight charges which they have paid exceed what said charges would have been upon the basis of the average rate per ton per mile on all freight transported by the Lehigh Valley Railroad Company. In support of this claim for reparation, he sets forth an exhibit in his brief, which covers the calendar years 1902 to 1907, inclusive. This claim, therefore, does not extend back to November 1, 1900, as do his other claims; but it includes the latter half of 1907, and therefore extends six months beyond the period covered by his larger claim for reparation on the basis of the proposed \$1 rate.

Complainants insist that the average rate per ton per mile upon coal ought not to exceed the average rate per ton per mile upon all freight traffic, and base their claim for reparation in large part upon the assumption that the higher rate per ton-mile on coal is proof of the unreasonableness of the rates in question. Defendant answers this contention by asserting that the initial service in connection with the transportation of coal, commonly called collection or assembly, and the terminal service at Perth Amboy, are both difficult and complicated, and involve extraordinary operating expenses, as well as the permanent investment of a large amount of capital, which are not incurred in the transportation of other classes of freight. The transportation of coal from the mining regions to Perth Amboy is described in detail in the record and may be summarized as follows:

Coal from the Wyoming region around Wilkes-Barre, after being assembled from the various branches, is carried east by way of Coxtan or Pittston Junction over what is known as the Mountain Cut-Off, thence by way of Avoca, Penn Haven Junction and Phillipsburg to South Plainfield, where it leaves the main line for Perth Amboy. Coal from the Lehigh region is collected from the various branches in the neighborhood of Hazleton, Lumber Yard, New Boston and Mount Carmel, and carried to Penn Haven Junction, from which point it follows the same course as the Wyoming coal. Coal from the Schuylkill region reaches the main line at Lizard Creek Junction from the regions around Blackwood. Coal in transit from the Wyoming region to Perth Amboy passes over defendant's Wyoming and New Jersey & Lehigh divisions. The Wyoming division extends from Sayre to Mauch Chunk, and includes the territory known as the Wyoming coal region, or the southern part of the northern coal field, and touches also the Lackawanna coal region. The New Jersey & Lehigh division extends from Easton to the sea end of the Perth Amboy docks. Defendant's Mahanoy & Hazleton division covers a portion of the Lehigh and a portion of the Schuylkill regions in the middle and southern coal fields. This division meets the main line at Penn Haven Junction.

Coal is brought from the collieries to assembly yards, from which it is in turn taken to classification yards, where trains are made up for the main-line hauls. In the Wyoming division there are two such yards, Port Bowkley and Coxtan, the former being an assembly yard and the latter both a classification and assembly yard.

At Perth Amboy defendant has adequate terminal facilities, storage bins, two docks and appropriate equipment for the handling of anthracite coal. Ten locomotives and crews are employed by the company in handling coal at the terminal. At the entrance to the terminal are a series of tracks, eight in number, about one-half mile long, known as the receiving tracks, upon which trainloads of coal are left by the road crews. Upon these tracks employees inspect and check the cars and designate by marks thereon the various kinds and sizes of coal, region and colliery from which shipped, 35 and such other information as may be necessary for proper unloading into vessels or storage bins. After the cars are so marked they are classified for purposes of disposition. When orders are received the coal is removed to the docks or stocking bins, both of which are provided with suitable trackage facilities.

Complainants' contention that the rates to Perth Amboy are unreasonable is based in part upon the testimony of certain persons who were formerly officers of the Delaware, Susquehanna & Schuylkill Railroad and of Coxe Brothers & Company. For many years prior to 1905, Coxe Brothers & Company were engaged in mining and shipping anthracite coal from their extensive properties in the Lehigh region. They owned and operated the Delaware, Susquehanna & Schuylkill Railroad, a road about 28 miles in length, which reached their different collieries and connected with the Lehigh Valley Railroad at a place called Lumberyard or Stockton Junction.

After January, 1894, the Coxe coal, instead of being carried to Perth Amboy in the trains of the Lehigh Valley, was transported to tidewater in the trains of the Delaware, Susquehanna & Schuylkill Railroad, and by its motive power, under a trackage contract between that road and the Lehigh Valley, which provided for the use of the tracks of the latter company from Stockton Junction to Perth Amboy, a distance of approximately 125 miles. The agreed compensation to the Lehigh Valley for the use of its tracks was $27\frac{1}{2}$ mills per gross ton per mile, or 35.94 cents per gross ton for the haul from Stockton Junction to Perth Amboy. The Lehigh Valley unloaded the coal at Perth Amboy into vessels or bins and performed other terminal service, for which it charged Coxe Brothers 12 cents per ton. Additional payments were agreed upon from time to time for other services by the Lehigh Valley, such as supplying additional motive power to push trains over grades, furnishing coal to Delaware, Susquehanna & Schuylkill locomotives, repairing cars at Perth Amboy and similar incidentals.

36 The contract of January, 1894, remained in force until April, 1904, when it was replaced by another contract, substantially similar in all material respects and providing for the same compensation to the Lehigh Valley and which was to have remained in effect for a period of 15 years. It remained in effect, however, only until 1905, when the Coxe properties were purchased by the Lehigh Valley Railroad.

During the period prior to the absorption of the Delaware, Susquehanna & Schuylkill Railroad by the Lehigh Valley Railroad

Company, L. C. Smith, manager of the Delaware, Susquehanna & Schuylkill Railroad Company, and J. H. Pennington, superintendent of motive power of said railroad, and J. Brinton White, vice president and treasurer of Coxe Brothers & Company, made certain calculations as to the cost of the Delaware, Susquehanna & Schuylkill Railroad of transporting anthracite coal to Perth Amboy, based on various elements of operating expense, including the aforementioned trackage charge of the Lehigh Valley Railroad.

Counsel for complainants has introduced the testimony of these three men relative to the cost of transporting coal from the Lehigh region; and insists that it has an important bearing on the cost of transporting coal from the Wyoming region, for the reason that it has been the custom of the Lehigh Valley Railroad Company to make the same rates from the Wyoming region to Perth Amboy as from the Lehigh region to Perth Amboy; and also because the Wyoming region has the advantage over the Lehigh region, both in distance and in grades.

L. C. Smith, former manager of the Delaware, Susquehanna & Schuylkill Railroad, testified that about 1900, he, as manager of the Delaware, Susquehanna & Schuylkill Railroad, made up a statement of cost to move one train of coal from Drifton, a mine of

37 Coxe Brothers & Company, to Perth Amboy, including trackage to the Lehigh Valley Railroad Company, the shipping charges of that company at Perth Amboy, and the return of empty cars, which statement is filed as Complainants' Exhibit No. 1.

The total cost per ton shown by said exhibit is 76.54 cents.

J. Brinton White, vice president and treasurer of Coxe Brothers & Company, who owned the entire stock of the Delaware, Susquehanna & Schuylkill Railroad Company, made frequent calculations as to the cost per ton of the movement of coal from the mines on the Delaware, Susquehanna & Schuylkill Railroad to Perth Amboy, and continued these calculations until he "got down to a figure which he knew to be correct." The figure which Mr. White arrived at was 76 cents per ton; but as this 76 cents included the trackage charge of the Lehigh Valley Railroad and the shipping charges at Perth Amboy, he was of opinion that the profit of the Lehigh Valley should have been deducted from the 76 cents, if the profit could have been ascertained.

J. H. Pennington was superintendent of motive power of the Delaware, Susquehanna & Schuylkill Railroad Company from 1899 until the latter part of 1905, when that road was bought by the Lehigh Valley Railroad Company, and he made certain tests for the purpose of determining the relative cost of transporting coal from Delaware, Susquehanna & Schuylkill Railroad mines to Perth Amboy in 60,000 and 100,000 pound capacity cars, respectively.

Based upon his tests for the cars of 100,000 pounds capacity (which it is claimed are now in use), counsel for complainants claims to show that the cost of transporting a ton of coal from the mines of the Delaware, Susquehanna & Schuylkill Railroad to and including the dumping of the cars at Perth Amboy, and the return of the

empty cars to the colliery, amounted to 62.41 cents; which
38 figure includes the profit of the Lehigh Valley Railroad
Company on its trackage charge and the profit on the shipping
expense of 12 cents at Perth Amboy.

Counsel for the Lehigh Valley Railroad Company, in his brief, enters upon an exhaustive criticism of Complainants' Exhibit No. 1. Among other things he says:

The exhibit includes no allowance for assembling; it contains no allowance for reserve equipment; it contains no allowance for depreciation; no allowance is made for overtime of crew; no allowance is made for non-revenue haul; no allowance is made for loss and damage or injuries to persons; the item shown for fuel is manifestly inadequate; the wages allowed are inadequate.

He also argues that as the estimate of J. Brinton White confirms that of Mr. Smith, the presumption is that Mr. White omitted the same items that were omitted by Mr. Smith.

As to J. H. Pennington's estimate of the cost per gross ton of transporting coal to Perth Amboy, counsel for the Lehigh Valley Railroad Company says that he admitted that in making the test he purposely left out of account such expenses as would be substantially the same, whether he used 60,000-pound cars or 100,000-pound cars. He did not take into account the following:

- Reserve engines.
- Maintenance and repairs of locomotives.
- Repairs to cars.
- Expenses of telephone and telegraph.
- Stationery.
- Clerks.
- General office expenses.
- Yard expenses.
- Terminal expenses.
- Loss and damage claims.
- Clearing wrecks, etc.

It will be noted that in the calculations made by L. C. Smith and J. Brinton White, one of the most important items was the
39 trackage charge of 35.94 cents per gross ton, which the Lehigh Valley Railroad Company charged the Delaware, Susquehanna & Schuylkill Railroad for the use of its tracks for the 125-mile haul from Stockton Junction to Perth Amboy.

As it did not clearly appear from the record what the conditions were that led to the trackage arrangement, further testimony was taken upon that point at the supplemental hearing. It was shown that prior to the trackage contract entered into by the Delaware, Susquehanna & Schuylkill Railroad Company with the Lehigh Valley Railroad Company, the coal traffic originating on the Delaware, Susquehanna & Schuylkill Railroad had moved to tide water over the lines of the Philadelphia & Reading Railroad. The following extract from the annual report of the Philadelphia & Reading Railroad Company for the year ended November 30, 1893, was read into the record:

A contract was made with Coxe Brothers & Company, under date of May 14, 1891, for the transportation over the Reading Railroad System of a large tonnage of coal from the mines of that company to New York tidewater and to other markets, the minimum amount to be 1,000,000 tons per annum.

In order to transport the coal to be furnished under this contract, a railroad 10 miles in length was constructed by the Reading Company to connect its lines with those of the Delaware, Susquehanna & Schuylkill Railroad, which was controlled by Coxe Brothers & Company, and a large coal tonnage had passed and was passing over this road; but the division of the freight rate as between the two railroad companies was felt by the receivers to be so inequitable to the Reading Company, as on the greater part of the tonnage it allowed the Delaware, Susquehanna & Schuylkill Railroad Company an average of about 73 cents per ton for gathering the coal, hauling it an average of about 12 miles to Roan Junction, and shipping it at Port Johnston, leaving for the Reading Company

only 80 cents per ton for hauling the coal 168 miles to Bound Brook Junction, that they notified Coxe Brothers & Company that after August 15, 1893, they would no longer transport their coal under that contract, offering, however, to continue to carry the coal upon terms similar to those which are ordinarily accorded to other railroad companies for the exchange of similar business. This offer was, however, not found satisfactory by Coxe Brothers & Company, and the transportation of their coal has, therefore, been almost entirely lost to the Reading Company.

The following extract from the annual report of the Lehigh Valley Railroad Company to its stockholders, for 1894, was also read into the record:

On January 31, 1894, a contract was entered into with the Delaware, Susquehanna & Schuylkill Railroad Company, whereby that company was granted the privilege of running its own trains coal laden to the tidewaters of New York, thus assuring to this company for a term of 15 years from July 1, 1894, an important traffic, that of the Cross Creek Coal Company, formerly Coxe Brothers & Company, for which several outlets existed, and which had been in contention for some time previously. It also removed an incentive for the construction of new lines into the territory tributary to the Lehigh Valley System. Local coal received from the line of that company continues to be hauled in our trains as it was previously.

It appears that, when the contract with the Lehigh Valley Railroad Company was entered into, the Philadelphia & Reading Railroad Company tore up its 10-mile extension which it had built to connect with the Delaware, Susquehanna & Schuylkill, because there was no longer any use for it.

For the purpose of showing the effect of the trackage contract of January, 1894, upon the movement of anthracite coal over the Lehigh Valley Railroad, counsel for that company at the supplemental hearing, put in evidence the following exhibit, viz:

41 *Statement of Anthracite Coal Received from the Delaware, Susquehanna & Schuylkill Railroad During the Fiscal Years Ended November 30.*

Year.	Gross tons.	Year.	Gross tons.
1891.....	233,031	1894.....	976,415
1892.....	199,310	1895.....	1,053,965
1893.....	350,295	1896.....	1,115,077
Total.....	782,636	Total.....	3,145,457

It was also shown that the Central Railroad of New Jersey had a track into Drifton, a point located on the Delaware, Susquehanna & Schuylkill Railroad, and that the Delaware, Susquehanna & Schuylkill Railroad also had a connection with the Pennsylvania at Tomhicken.

Defendant has endeavored to show the actual cost of transporting coal from the Wyoming district to the barges at Perth Amboy. Three civil engineers, William J. Wilgus, J. F. Stevens and John F. Wallace, were engaged by defendant to investigate the transportation of coal from the anthracite region to tidewater for the purpose of ascertaining the cost thereof. They were assisted in their investigation by officers and employees of the road and by engineers in Mr. Wilgus' office. Mr. Wilgus prepared an estimate of the cost of carrying coal based upon theories and formulæ which were approved by the other engineers. His estimate is set forth in a voluminous exhibit known as "Defendant's Exhibit F-3." The exhibit contains all the details from which the final estimate of cost is deduced. The recapitulation of Exhibit F-3 is as follows:

42 *Cost of Transporting Anthracite Coal on the Lehigh Valley Railroad from the Wyoming District to Perth Amboy.*

Items.	Perth Amboy terminal.	Main line, Perth Amboy to Cox-ton.	Wyoming collection district.	Total.
Operating expenses, including taxes.....	\$0.1189	\$0.6915	\$0.0866	\$0.8970
Interest:				
Roadbed, tracks, and structures.....	.0700	.1470	.0412	.2582
Equipment.....	.0096	.0437	.0253	.0814
General facilities.....	.0012	.0045	.0010	.0067
	.0808	.1952	.0705	.3465
Depreciation:				
Roadbed, tracks, and structures.....	.0071	.0034	.0009	.0114
Equipment.....	.0080	.0646	.0176	.0902
General facilities.....	.0004	.0015	.0003	.0022
	.0155	.0695	.0188	.1038
Total.....	.2152	.9562		1.3473
Additions and betterments.....				.0409
Risks and deficits.....				.1070
Grand total.....				1.4943

There are many circumstances, however, connected with the preparation of this exhibit, which seriously impair its value as evidence on the question of cost.

Mr. Wilgus testified that the figures which he used in preparing said exhibit as to the value of the roadbed, track and structures, and value of equipment, were based on an examination of the road and an examination of the equipment, and that he had attempted to estimate the cost of reproduction. This work, he states, was done by himself and assistants in his employ. The assistant in his employ who undertook to make an examination of the road with a view to determining the cost of reproduction was T. A. Lang and Mr. Wilgus testified that his calculations are absolutely dependent upon the information furnished him by Lang.

The story of Mr. Lang's investigation as to cost of reproduction, as told by Lang himself, was as follows:

43 He left Perth Amboy at 1.20 P. M. on a passenger train for Easton, arriving there about 3.20 or 3.30 P. M. In going to Easton he stood on the rear platform of the train. After arriving at Easton, he did nothing more that day, as it was Sunday. The following morning at 9 A. M. he left Easton on a pony engine, which had a coach on top of the boiler. On this engine he traveled at the rate of 15 or 20 miles an hour, stopping at various points. About 5.30 P. M., of the same day, he arrived at Wilkes-Barre and stayed there all night, all the next day and the next night. While there he made computations in the railroad company's office. On the following day he left Wilkes-Barre at 8.30 A. M. on a passenger train and arrived at Easton about 11 or 12 o'clock. He remained in Easton until that afternoon, and then took a train for New York. While at Easton he devoted a "few minutes" to an examination of the Delaware bridge and the Easton steel viaduct. Based upon this examination, he furnished Mr. Wilgus the data which he required as to estimated cost of reproduction of the Lehigh Valley Railroad.

This examination by Lang was made in the latter part of April, 1909. Mr. Wilgus accepted his estimates, and gave his testimony on April 29, 1909. Mr. Lang, however, was not called as a witness until May 25, 1909. Evidently feeling that his first superficial examination of the road would become the subject of attack, he undertook early in May to make a more thorough examination of the road.

On this second trip he consumed eight and one-half days going over the road on a hand car, and the results of his work on the second trip he terms "his check estimate." The cross-examination of Mr. Lang developed that his check estimate was also a very superficial piece of work. He testified that he "could see" the thickness of the ballast "very easily," and that he measured it "at one place" only; that it was from 18 to 20 inches in thickness. He also

44 testified that he started out to count the number of switches and frogs, but did not carry it all the way through. He further says that there never had been any examination of the ties and

ballast or going over the road in a hand car at the time that Mr. Wilgus made his estimate.

Based upon information thus furnished, Mr. Wilgus undertook to determine the cost of carrying a ton of coal from the Wyoming district to Perth Amboy, and Messrs. Wallace and Stevens were called as witnesses to confirm the reliability of his figures.

Mr. Wilgus testified that on the trip which he made over the Lehigh Valley Railroad, he started from New York at 6 P. M. in an observation car with Messrs. Wallace and Stevens and certain officials of the Lehigh Valley Railroad Company, and went to Wilkes-Barre. The two following days were spent in riding over the main line of the Lehigh Valley Railroad and some of its branches. It appears never to have been the intention that Messrs. Wilgus, Wallace or Stevens should personally do any of the detail work incidental to the determination of the cost of carrying coal to Perth Amboy. All of that was to be done for them by subordinates, and they were then to testify whether they believed the work of these subordinates constituted a conservative estimate of the cost.

Mr. Stevens testified in substance that he believed it possible for a competent engineer to get a correct approximate idea of the value of a railroad by riding over it, and that he has done considerable work in estimating values by traveling over railroads. He stated that he was not prepared to dispute Mr. Wilgus' figures, and that he would not guarantee them; and "that it would be worse than foolish for him to say that he had time to undertake to make a mile-by-mile estimate of the cost of reproducing the Lehigh Valley Railroad." The most that he had to say concerning Mr. Wilgus' estimate was that it was "probably conservative."

45 Mr. Wallace frankly admitted that his testimony given in corroboration of Mr. Wilgus' figures was a matter of purely personal judgment, based on his experience and observation. He testified that men in his line of business were continually drawing comparisons and making "estimated judgments," and that sometimes they were correct and sometimes wrong. He further stated that it was his custom to value railroad property very much as a farmer would value a horse.

The estimate of cost made by Mr. Wilgus is based on the fundamental assumption that the cost of carrying coal is equal to the average cost of carrying all traffic. If this proposition be sound, it follows that by far the greater part of tariffs covering the transportation of coal are improperly constructed, for the rates upon coal are generally much below the average rates.

Again, as a basis of apportioning expenses for which no actual division could be obtained, the engineers used the relation of passenger-train ton-mileage to freight-train ton-mileage, finding that of the total the former was 7.8 per cent. and the latter 92.2 per cent. This arbitrary basis of apportionment seems to be unwarranted when we take into consideration the relation which exists between freight revenue and passenger-train revenue on the Lehigh Valley Railroad. Those revenues were as follows for the years shown:

	1901.	1905.	1908.	1910.
Total freight revenue.....	\$19,829,363	\$25,962,920	\$30,186,582	\$30,579,597
Passenger-train revenue.....	3,460,528	4,116,847	4,842,652	5,097,118

It thus appears that upon the basis of relative earnings at least 14 per cent. of the value of the road could properly have been assigned to passenger traffic, whereas in the estimate made by Mr. Wilgus but 7.8 per cent. has been so assigned.

Moreover, it will be noted that the estimate of cost shows that the average cost of carrying anthracite coal from the Wyoming
46 region to Perth Amboy is \$1.49. An exhibit filed by the Lehigh Valley shows that its average receipts per gross ton of anthracite coal to Perth Amboy for the 10 years ending June 30, 1908, were \$1.46. It would therefore follow that all anthracite coal which has been hauled by the Lehigh Valley to tidewater has been carried at a loss of about 3 cents per ton. But it is shown by reports on file with the Commission that the operations of the Lehigh Valley Railroad Company for a number of years past have been exceedingly profitable, and as anthracite coal has constituted almost half of its tonnage, it is fair to assume that it has made a profit upon the handling of that commodity.

There are other matters contained in the record which go to show that the cost of transporting coal as estimated by Mr. Wilgus is excessive.

Henry B. Ely, who was formerly general eastern agent for Coxé Brothers & Company, testified that after the decision in the case of Coxé Brothers & Co. vs. Lehigh Valley Railroad Company, 4 I. C. C. Rep., 535, in 1891, and up to the 31st of January, 1894, the rates paid by Coxé Brothers & Company were the tariff rates of the Lehigh Valley, less a discount of 35 per cent. The tariff rates which were in effect during this period are contained in an exhibit filed by the Lehigh Valley, and deducting said discount therefrom, it appears that the rates actually charged Coxé Brothers & Company were as follows:

	Rate per ton.
For prepared sizes.....	\$1.10½
For pea coal.....	.91
For buckwheat and smaller sizes.....	.78

Defendant has also filed in evidence an exhibit, which shows the adjusted rates to Perth Amboy on the various grades of anthracite coal, by months, during the period from January, 1895, to October, 1900, inclusive, a period of five years and nine months, immediately
47 preceding the discontinuance of adjustments upon the percentage basis. An average of the rates contained in said exhibit shows the following:

	Rate per ton.
Prepared sizes	\$1.4164
Pea coal	1.1712
Buckwheat	1.1566

These latter figures are of themselves sufficient to show that the estimated cost of carrying coal to tidewater of \$1.49 is far from correct.

A very noticeable feature of the work of these experts employed as disinterested parties to ascertain the cost of carrying coal to Perth Amboy is the manner in which they arrived at their valuations of real estate and rights of way.

Mr. Wilgus testified that he did not himself make the estimates upon the value of the Perth Amboy terminals, but took the estimates of his assistant, Mr. Van Houton. Mr. Van Houton testified that he got his information as to the cost of reproduction of the Perth Amboy terminals from the general solicitor of the defendant, because he is an authority on real estate and handles all the real estate matters for the Lehigh Valley Railroad. Mr. Wilgus also stated that he valued the right of way from Perth Amboy to South Plainfield Junction at \$3,000 an acre, and between Penn Haven and Phillipsburg at \$1,200 an acre, and that these estimates were made "not only upon the way it impressed me, but also from consultation with Mr. Schaperkotter, the general solicitor of the company."

Complainants have called attention to the rates of the Pennsylvania Railroad Company for the transportation of anthracite and the rates of certain bituminous carriers. The Pennsylvania Railroad Company carries anthracite coal from South Wilkes-Barre and Plymouth, in the Wyoming region, to South Amboy, N. J. There

are two routes by which the Pennsylvania may carry this
48 coal, the longer route being 276 miles and the shorter 222 miles. Owing to the fact that the grades on the long haul

are very much easier than those on the short haul, the long haul is the one generally used. Its rates for this transportation are as follows: Prepared sizes, \$1.40 per gross ton; pea coal, \$1.25 per gross ton; and buckwheat, \$1.15 per gross ton. Up to a comparatively recent date the same rates applied from points on the Delaware, Lackawanna & Western Railroad, which brought the coal to the Pennsylvania Railroad, and the Pennsylvania allowed the Lackawanna a 15-cent lateral charge. The Pennsylvania has since withdrawn the lateral allowance and requires payment to it of its full rate.

The Norfolk & Western Railway Company transports bituminous coal from Pocahontas to Lambert's Point, 377 miles, crossing the Blue Ridge and Allegheny Mountains, at a rate of \$1.40 per gross ton, and this includes the collection of the coal in the Pocahontas district and dumping the same into vessels at Lambert's Point. The rate per ton per mile for this haul is \$0.00377. In the Pocahontas district there are two assembling yards, Bluefield and Vivian, the average distance of the collieries from Bluefield being about 29 miles, and the average distance of the collieries from Vivian about 15 miles. During 1907 the Norfolk & Western collected from the 67 collieries in the district 7,285,360 tons of coal. During the same year the Lehigh Valley collected 4,142,442 tons from the 26 collieries connected with its tracks in the Wyoming region. The following exhibit shows certain rates for the transportation of bituminous coal, together with the length of haul and the rate per ton per mile:

49 *Statement Showing Origin, Destination, Transporting Railroad, Miles Hauled, Rate Charged, and Rate per Ton per Mile on Bituminous Coal Shipments to Tidewater.*

(2,240 Pounds per Ton. Rates Include Dumpage from Piers to Vessels.)

Region or district.	Transporting railroad.	Destination.	Miles hauled.	Rate charged.	Rate in cents per ton per mile.
Myersdale	Baltimore & Ohio	Baltimore	215.0	\$1.18	0.549
Do	do	Philadelphia	310.8	1.25	.402
Do	do	St. George	300.6	1.55	.396
Pocahontas	Norfolk & Western	Norfolk (Lambert's Point)	377.0	1.40	.371
New River Thurmond	Chesapeake & Ohio	Newport News via Lynchburg	418.0	1.40	.335
Do	do	Newport News via Gordonsville	381.0	1.40	.367
Kanawha Handley	do	Newport News via Lynchburg	457.0	1.50	.328
Do	do	Newport News via Gordonsville	420.0	1.50	.357
Kentucky Marrow bone	do	Newport News via Lynchburg	673.0	1.70	.253
Do	do	Newport News via Gordonsville	636.0	1.70	.267
Beech Creek	New York Central and Philadelphia & Reading	Port Reading	308.0	1.55	.503
Do	do	Philadelphia (Port Richmond)	229.0	1.25	.546
Clearfield	Pennsylvania R. R.	Baltimore (Canton Pier)	242.2	1.18	.487
Do	do	South Amboy	322.5	1.55	.481
Do	do	Philadelphia (Greenwich piers)	202.2	1.25	.477
Do	do	Philadelphia via Lock Haven and Sunbury	317.0	1.25	.394

Defendant answers that the tidewater rate of the Pennsylvania Railroad, cited by the complainants, is entirely inconsistent with the other anthracite rates charged by the Pennsylvania, whereas the Lehigh Valley tidewater rate is in line and consistent with its other anthracite rates. An exhibit in this connection shows that the Pennsylvania Railroad Company's rate on prepared sizes to Harrisburg, a distance of 110 miles, is \$1.50; to Philadelphia, a distance of 164 miles, \$1.80; to Reading, a distance of 111 miles, \$1.80; to Perth Amboy, a distance of 226 miles, \$1.80; to South Amboy, when not for transshipment, \$1.80. The Pennsylvania Railroad Company is a bituminous rather than an anthracite road.

50 The defendant also introduced evidence tending to show that the market for anthracite coal on the lines of the Pennsylvania Railroad exhausts the supply originating on the road, and for this reason a 15-cent lateral was allowed on coal assembled on other roads and turned over to the Pennsylvania. On such shipments the Pennsylvania was relieved of the gathering cost; and in view of the high line rates on anthracite coal over the Pennsylvania, the arrangement was favorable to the railroad. As has been noted, the Pennsylvania has since withdrawn the lateral allowance.

In so far as the comparison with bituminous rates is concerned the defendant calls attention to the fact that bituminous rates are generally less than anthracite rates, due in part to the difference in value of the two kinds of coal, and that there are dissimilarities in connection with the carriage and shipment of bituminous and anthracite coal which render the transportation of anthracite coal more expensive. About 95 per cent. of the coal shipped from the bituminous

regions is run of mine and no such elaborate classification is necessary in the assembling regions as in the anthracite region. Bituminous coal is not stored at tidewater and the carriers are therefore relieved of the expense of building storage bins and of placing the coal in the bins and removing it therefrom. It is also claimed that the carriage of bituminous coal involves less empty car mileage, but upon that point the record is rather indefinite. At any rate, the conditions relating to the transportation of anthracite and bituminous coal have not been shown to be similar to such a degree that the existence of a lower rate on bituminous would warrant a conclusion that a higher rate on anthracite on a different road is unreasonable.

It is earnestly contended that any such comparison disregards the fact that the Lehigh Valley Railroad was built and is maintained primarily as a coal-carrying road; that as such it has the right to receive a return upon the coal transported sufficient to enable it
51 to operate profitably, and is further justified in obtaining all traffic that it can secure in addition to its anthracite tonnage at rates which exceed cost of operation; and that a successful search for such outside tonnage, so long as it is carried at a margin of profit above operating expenses, aids the road to perform more cheaply its service in gathering and carrying coal.

Defendant contends that the extraordinary terminal expense attributable to the comparatively short haul on anthracite coal makes any per-ton-per-mile comparison improper and misleading.

In connection with its terminal at Perth Amboy, defendant has erected 372 stocking or storage bins, which vary in capacity from 500 to 1,000 tons each, and have a total capacity of about 250,000 tons. Trestles extend over the stocking bins and coal is dropped into them from cars which have been pushed onto the trestles. Underneath the stocking bins are tunnels through which cars are run to remove the coal as called for. About 350 cars of 60,000 pounds capacity are employed exclusively in removing coal from the bins.

Attention is called by defendant to the special privileges accorded and services rendered in connection with the transportation of anthracite coal without extra compensation above the tidewater rates. The rate covers delivery of coal by the railroad into vessels at Perth Amboy. No demurrage is charged on cars at the collieries or at Perth Amboy. A slight deduction is made from the scale weights at the collieries to offset the weight of water in the coal when loaded, and an allowance is made for depreciation in weight due to re-handling. The shippers have the privilege of stocking in transit. Extensive storage privileges are permitted at Perth Amboy, the railroad providing the bins and performing the labor of storing and lifting from storage without additional compensation. This privilege tends to permit daily operation of mines to the limit of their

52 production regardless of the fluctuation of the market demand. Moreover, the demand for different sizes is more or less irregular, while the production of the several sizes is fairly uniform; and this condition makes the storage privilege of additional value to the shipper at certain seasons of the year. Complainants have freely exercised their privilege of storage. In 1907 they had 47.56 per cent. and in 1908 32.27 per cent. of the coal shipped by them to Perth Amboy placed in the bins. Of the coal

tonnage carried to Perth Amboy in 1908, 20.96 per cent. was placed in the bins.

It is claimed that the limited life of anthracite railroads has an important bearing on the matter of freight rates, and is therefore a factor to be taken into consideration in connection with the question of "fair return".

As to the limited life of the anthracite railroads, counsel for defendant say in their brief:

The evidence establishes the fact that when the railroad shall be deprived of the tonnage from the collieries along its lines, and the incidental tonnage involved in and dependent upon the production of coal, the traffic on the Mahanoy and Hazleton Division and the Blackwood Branch will for all intents and purposes be nil.

As to the Wyoming Division, the investment in everything but the main line will have been destroyed, and the continued existence of the road will depend upon whether or not the through traffic is sufficient to pay the operating expenses and the interest charges.

There are many instances where, on account of closing up breakers for one reason or another, portions of the Lehigh Valley Railroad have already become useless.

They then cite the following instances of abandoned tracks in the Wyoming region, viz:

- Crescent breaker, 1 mile long, abandoned 1900.
- 53 Babylon breaker, $1\frac{1}{2}$ miles.
- Lawrence track, partially abandoned, length not given.
- Phoenix track, 1 mile long.
- Heidelberg breaker, No. 2, tracks abandoned, length not given.
- Henry breaker, tracks $1\frac{1}{3}$ miles long, will soon be abandoned.
- Wyoming breaker, $\frac{1}{4}$ mile long.
- Midvale track, $\frac{1}{2}$ mile long, abandoned.
- Franklin breaker, $1\frac{1}{5}$ miles.
- Abbott or Hillman mine, $\frac{1}{3}$ mile long.
- Mosier mine, track $1\frac{9}{100}$ miles, abandoned.
- Butler colliery, tracks taken up; length not given.

In addition, it is stated that many collieries have been abandoned which have not involved the taking up of tracks, the tracks remaining in partial use in connection with other breakers.

It will be noted that while the list of abandoned tracks in the Wyoming district has the appearance of being quite large, yet the sum total of such of the mileages as are specified shows that a fraction more than 8 miles have been abandoned.

Counsel also in their brief give quite a list of names of breakers which have been abandoned on the Mahanoy and Hazleton Division; but it is found that the total of abandoned mileage on this division is only 9.5 miles.

As to the kindred subject, namely, the exhaustion of anthracite coal supply, counsel in their brief thus state the result of the testimony of W. F. Dodge, an expert mining engineer, introduced as a witness on behalf of the defendant:

The total future shipments from the Wyoming Division, starting with the year 1909, will amount to 91,230,000 tons. The lives of the various collieries will vary from 5 to 50 years. The

54 annual output is estimated for the first five years to 19,395,000 tons, and will diminish gradually until, from the twenty-fifth to the thirtieth year, the annual output is estimated at only 7,055,000 tons, dwindling down in the period between the forty-fifth and fiftieth years to 50,000 tons per annum. At the end of 25 years, according to the testimony of Mr. Dodge, the output of the Wyoming region will be less than half what it is now, and the end of 50 years will cease altogether.

On the other hand the following more optimistic view of the situation appears from the Report of the Anthracite Coal Strike Commission, rendered to the President of the United States, March 18, 1903, viz:

What is of some importance, however, in connection with the discussion of the past production is a consideration of what is to be expected in the future in the way of production and the probable duration of the anthracite coal supply. The original deposits of the anthracite coal field have been ascertained with a reasonable degree of accuracy.

According to the estimates of the Pennsylvania geological survey the amount of workable anthracite coal originally in the ground was 19,500,000,000 tons. The production to the close of 1901, previously stated, amounted to 1,350,000,000 long tons, which would indicate that there remained still available a total of 18,150,000,000 tons. Unfortunately, however, for every ton of coal mined and marketed one and one-half tons, approximately, are either wasted or left in the ground as pillars for the protection of the workings, so that the actual yield of the beds is only about 40 per cent. of the contents. Upon this basis the exhaustion to date has amounted to 3,375,000,000 tons. Deducting from this the original deposits the amount of anthracite remaining in the ground at the close of 1901 is found to be, approximately, 16,125,000,000. Up

55 the basis of 40 per cent. recovery, this would yield 6,450,000,000 long tons. The total production in 1901 was 60,242,560 long tons. If this rate of production were to continue steadily, the fields would become exhausted in just about one hundred years.

Mr. William Griffith, in a series of articles contributed to the Bond Record in 1896, considers that the estimates upon which the foregoing computations have been made were too liberal. His estimate of the amount of minable coal remaining at the close of 1896 was 5,073,786,750 tons.

In the six years from 1896 to 1901, inclusive, the production has been, approximately, 308,570,000 tons, which would leave still available for mining 4,765,216,750 tons. This supply, at the rate of production in 1901, would last a little less than 80 years. But indicating how susceptible to error are human predictions, it is worth to state that in his carefully prepared statement, published in 1896, Mr. Griffith assumes the limit of annual production would be reached in 1906 and would amount in that year to 60,000,000 tons.

This amount of production was reached in 1901, in just half the time predicted by Mr. Griffith, and the production of January, 1902, as recently reported, shows that the anthracite mines are capable of producing at a rate of 72,000,000 tons annually in their present state.

of development. It is not to be supposed, however, that the annual rate of anthracite production will continue practically uniform until the mines are exhausted and then suddenly cease. Portions of the fields have already been worked out, others are rapidly approaching total exhaustion, while others at the present rate of production will, it is calculated, last from 700 to 800 years. If we can assume the annual production will have reached its maximum limit at 56 between 60,000,000 and 75,000,000 tons, and that the production will then fall off gradually as it increased, we may expect anthracite mining to continue for a period of from 200 to 250 years. (Report of Anthracite Coal Strike Commission, pp.21,22.)

Defendant claims the right to earn enough out of its coal rates to provide for a return of the principal of the investment in that part of the railroad company devoted to the carriage of coal, when and as this principal becomes reduced and extinguished by exhaustion of the coal. We have noted the estimate of defendant's witnesses to the effect that shipments of anthracite coal over the railroad will practically cease in 50 years, and we have quoted the opinion expressed on the same subject by the Anthracite Coal Strike Commission to the effect that production may last for 250 years. Probably the truth lies somewhere between the two extremes. During the years 1903 to 1910, the Lehigh Valley Railroad Company under the rates in controversy succeeded in accumulating an unappropriated surplus of \$27,219,780. If the company could accumulate this sum for every eight-year period during the next 30 or 40 years, it would have a surplus in the neighborhood of \$125,000,000. It seems, therefore, that the present rates are more than sufficient to meet defendant's idea of an annual income sufficient to provide for return of the capital when that part of the railroad devoted to the carriage of anthracite coal loses its earning capacity through the exhaustion of that commodity. This matter, however, is too speculative to be of much value in determining the reasonableness of present rates. By the time anthracite coal is exhausted other traffic may have become so dense that the present value of the road will not be impaired.

It requires no extended argument to sustain the proposition that the maintenance of an unreasonably high rate operates to the advantage of the Lehigh Valley Railroad Company as a dealer 57 in coal. The record shows that the only line of demarcation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company is one of bookkeeping. Assuming for purposes of illustration that the cost of mining anthracite coal is \$2 per ton and the cost of carrying it to tidewater is \$1 per ton, it follows that the cost of coal at tidewater would be \$3 per ton; and if the published rate were \$1 the independent operator and the railroad coal company would be on a fair competitive basis so far as the cost of mining and transportation are concerned. But as between the railroad company and its coal company it matters not whether the profit comes from mining or transporting the coal. So, therefore, if, instead of the \$1 rate above mentioned, the railroad company were to establish a rate of \$1.50 per ton, the railroad and its coal company could still sell coal at tidewater for \$3 per ton,

standing a deficit of 50 cents per ton in the mining price and taking an equal profit in the transportation price. But the independent operator cannot recoup himself in this manner, and the best price that he could make at tidewater would necessarily be the mining price of \$2, plus the carrying charge of \$1.50, or \$3.50; and he would enter the market at a disadvantage of 50 cents per ton as compared with the railroad and its coal company. It is obvious that such an advantage would enable the railroad company and its alter ego, the coal company, to monopolize the field of production and the selling market. Whatever the means employed, it is a fact that the railroad coal company has monopolized the coal field served by it. In 1901, 47 per cent. of the defendant's coal tonnage to Perth Amboy was controlled by it and 53 per cent. by independent operators; while in 1908 the defendant controlled 95 per cent. of the anthracite tonnage over defendant's line to Perth Amboy and the independent operators 5 per cent. During the same period complainants' shipments to Perth Amboy decreased from 147,811 tons for 1901 to 40,562 tons for 1908.

Coming now to the question of the reasonableness of the rates, counsel for defendants asserts that the rates on coal must be sufficient to produce four results, viz: (1) An income sufficient to make up for past deficiencies in current return on investment. (2) A reasonable current annual return upon the investment in the railroad and transportation adjuncts. (3) An amount sufficient to provide reasonably for keeping the property up to constantly modern standards—i. e., such improvements as are necessary for public convenience and safety and to enable the railroad to get business in competition with other roads. (4) An amount sufficient to provide for a return of the principal of the investment, when and as this principal becomes reduced and extinguished by the exhaustion of coal freight.

Under the first proposition defendant argues that the present rates should be sufficiently high to enable it now to earn the amount by which it has fallen short of paying a 6 per cent. annual dividend in the past, or at least as far back as 1894. It shows that a dividend rate of 6 per cent. applied to its common stock of \$40,441,100 for the period from November 30, 1894, to June 30, 1908, would amount to \$35,091,276; that during this period the dividends paid amounted to \$7,260,264; and argues that upon a 6-per-cent basis the common-stock shareholders suffered a deficiency in dividends during this 14½-year period of \$27,831,112. In the Wilgus estimate above mentioned 10 cents per ton is added to the assumed cost of carrying coal to Perth Amboy for the purpose of "making good the deficit of over \$20,000,000 in dividends" for past years.

Assuming, without conceding, that the present producers and consumers of anthracite coal must bear the burden of the misfortunes or mismanagement of a previous generation, it is worth while to inquire whether this claim does not amount for the most part to a declaration, not that the shareholder is entitled to a fair dividend, but rather to an assertion that he may invest his dividends in improvement of the property and have it in cash also.

Certain aspects of the financial condition of the Lehigh Valley for the years 1901 to 1910, inclusive, are set forth in the following table:

Year ending June 30—

Item	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
Sec. A. MILEAGE:										
1. Owned—single track, miles	317.67	317.09	316.98	311.63	308.12	306.70	302.30	302.39	303.00	302.61
2. Owned—all tracks, miles	797.17	799.66	797.84	799.69	802.09	816.42	834.66	832.99	840.86	840.86
3. Operated—single track, miles	1,387.36	1,387.24	1,382.15	1,392.67	1,393.87	1,429.16	1,443.24	1,447.68	1,445.67	1,440.25
4. Operated—all tracks, miles	2,905.48	2,923.31	2,983.68	2,971.87	3,003.30	3,103.48	3,163.30	3,228.49	3,241.48	3,251.43
Sec. B. COST OF ROAD AND EQUIPMENT										
Per mile owned—single track	\$37,557.712	\$37,557.712	\$46,435.550	\$46,435.550	\$48,410.162	\$48,410.162	\$54,365.714	\$58,782.936	\$58,782.936	\$61,443.218
Per mile owned—all tracks	119,543	119,760	146,468	149,098	157,115	167,842	178,440	184,936	184,936	203,044
Per mile operated—single track	47,289	47,090	58,201	58,067	60,345	68,319	73,571	70,517	70,517	73,571
Sec. C. TOTAL CAPITALIZATION										
Per mile owned—single track	\$7,415.100	\$7,900.100	\$9,550.072	\$9,267.100	\$9,984.100	\$10,352.100	\$12,644.100	\$13,338.941	\$12,940.747	\$12,707.047
Per mile owned—all tracks	27,378.179	27,777.268	38,907.274	38,497.100	42,123.262	42,859.100	48,559.100	48,754.643	47,289.100	47,289.100
Capital stock	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100
Funded debt	47,459.000	47,459.000	67,114.000	66,826.000	58,545.000	80,541.000	89,203.000	91,897.881	89,045.947	86,575.947
Sec. D. TOTAL OPERATING REVENUES										
Per mile operated—single track	23,654.215	23,668.672	25,692.270	28,672.362	30,235.346	32,150.167	35,287.581	37,436.745	34,949.653	38,151.174
Per mile operated—all tracks	17,049	17,062	18,455	20,588	21,692	23,495	24,460	26,854	24,176	26,459
Total operating expenses	8,141	8,097	8,683	9,648	10,067	10,228	11,155	11,593	10,782	11,698
Per mile operated—single track	18,676.927	19,103.254	18,377.922	18,255.917	18,445.230	19,692.035	21,700.358	24,012.038	22,641.145	23,814.256
Per mile operated—all tracks	13,462	13,771	13,201	13,109	13,223	13,772	15,096	16,587	16,592	16,536
Ratio to total operating revenues, per cent.	6.428	6.535	6,222	6,143	5,142	6,281	6,590	7,438	6,854	7,302
Analysis of operating expenses under official classification:										
Maintenance of way and structures	78.96	80.71	71.53	63.67	61.01	61.41	61.50	64.16	64.50	62.42
Per mile operated—single track	4,241,717	4,632,997	4,099,169	3,658,204	3,265,583	3,153,245	3,196,354	3,386,642	3,273,329	3,462,903
Per mile operated—all tracks	3,057	3,340	2,944	2,196	2,346	2,206	2,215	2,348	2,264	2,404
Ratio to total operating revenues, per cent.	1.460	1.585	1.388	1,029	1,089	1,006	1,011	1,063	1,010	1,062
Maintenance of equipment:										
Per mile operated—single track	17.93	19.56	18.46	16.67	16.82	9.83	9.06	9.06	9.37	9.06
Per mile operated—all tracks	4,448,244	5,149,924	4,654,395	4,744,232	4,894,269	6,485,794	6,186,542	6,163,874	5,862,430	5,965,810
Ratio to total operating revenues, per cent.	3.206	3.712	3,872	3,407	3,511	3,808	4,287	4,261	4,034	4,163
Per mile operated—single track	1,531	1,762	1,589	1,596	1,630	1,751	1,866	1,906	1,799	1,836
Ratio to total operating revenues, per cent.	13.81	21.76	18.27	16.54	16.19	17.13	17.54	16.44	16.62	16.71

LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Item	Year ending June 30—									
	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
Traffic and transportation expenses—										
Per mile operated—single track	9,251,820	8,581,666	8,954,825	9,857,585	9,694,567	10,421,778	11,686,787	12,121,580	10,760,203	11,512,285
Per mile operated—all tracks	6,669	6,186	6,440	7,078	6,955	7,292	8,056	8,373	7,443	7,993
Ratio to total operating revenues, per cent	3.184	2,985	3,085	3,217	2,228	3,326	3,694	3,765	3,320	3,530
General expenses—										
Per mile operated—single track	39.11	36.25	34.39	34.38	32.06	32.52	33.12	32.39	30.79	30.17
Per mile operated—all tracks	735.146	738.667	618.533	685.895	587.011	621.218	630.075	637.940	709.704	713.119
Ratio to total operating revenues, per cent	530	533	445	428	421	436	435	441	451	495
Analysis of operating expenses between labor and other expenses:										
Compensation paid direct to labor	253	253	210	201	195	196	199	196	219	219
Ratio to total operating revenues, per cent	3.11	3.12	2.41	2.08	1.94	1.94	1.78	1.71	2.03	1.87
Compensation paid direct to labor—										
Per mile operated—single track	9,193,572	8,995,715	10,550,479	10,977,294	10,920,360	12,013,758	14,282,297	12,891,828	12,113,151	13,703,030
Per mile operated—all tracks	6,631	7,205	7,579	7,882	7,894	8,406	9,896	8,905	8,379	9,514
Ratio to total operating revenues, per cent	3.166	3,419	3,572	3,694	3,636	3,834	4,515	3,993	3,737	4,202
Compensation paid general officers	38.89	42.23	41.37	38.29	36.12	37.49	40.48	34.44	34.66	35.92
Per mile operated—single track	139,352	128,320	145,835	116,746	103,158	104,576	129,718	178,063	184,768	160,821
Per mile operated—all tracks	100	83	105	84	74	73	90	123	128	112
Ratio to total operating revenues, per cent	48	44	49	39	34	33	41	56	57	49
Material, fuel, and all other items										
Per mile operated—single track	59	54	56	40	34	32	37	49	53	42
Per mile operated—all tracks	9,338,003	8,979,219	7,681,408	7,161,877	7,421,682	7,563,705	7,288,343	10,942,147	10,243,226	9,860,405
Ratio to total operating revenues, per cent	6,731	6,473	5,517	5,143	5,325	5,293	5,050	7,559	7,085	6,909
	3,214	3,072	2,601	2,410	2,472	2,414	2,304	3,389	3,160	3,051
	39.48	37.94	39.90	24.96	24.55	23.60	20.65	29.23	29.31	26.06

LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Year ending June 30—

Item	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
Sec. D. TOTAL OPERATING REVENUES—										
Continued.										
Taxes	\$312,182	\$285,781	\$290,995	\$471,262	\$538,933	\$468,849	\$590,501	\$850,361	\$780,404	\$794,998
Per mile owned—single track	983	901	915	1,512	1,749	1,529	2,185	2,812	2,575	2,627
Per mile owned—all tracks	392	358	364	589	672	575	801	1,020	937	946
Per mile operated—single track	225	206	208	338	387	328	458	568	540	552
Per mile operated—all tracks	107	96	98	159	179	160	209	263	241	244
Ratio to total operating revenues..... per cent.	1.31	1.21	1.13	1.65	1.78	1.47	1.87	2.27	2.23	2.09
Operating income	4,665,116	4,279,637	7,024,352	9,945,183	11,251,182	11,899,303	12,926,522	12,564,346	11,628,314	13,541,920
Per mile operated—single track	3,362	3,085	5,046	7,141	8,072	8,326	8,956	8,679	8,044	9,402
Per mile operated—all tracks	1,696	1,464	2,378	3,346	3,746	3,797	4,096	3,892	3,587	4,152
Ratio to total operating revenues..... per cent.	19.73	18.08	27.34	34.68	37.21	37.12	36.53	33.57	33.27	35.49
SEC. E. INCOME ACCOUNT:										
Operating income from rail-road operation	4,665,106	4,279,637	7,024,352	9,945,183	11,251,182	11,899,303	12,926,522	12,564,346	11,628,314	13,541,920
Additions to income: (total of items 1 and 2 following)	1,286,836	1,367,808	1,660,528	1,682,763	1,493,508	1,548,521	1,726,188	1,474,823	1,067,273	1,463,372
1. Rents received from other roads for the use of road, equipment, and facilities of the operating property										
2. Interest on bonds and dividends on stocks in separately operated railroads and income from other miscellaneous property	718,006	621,011	992,233	1,209,376	1,040,498	739,670	781,050	{ 509,581 } { 108,331 }	292,630	409,013
	568,738	746,797	698,296	473,397	453,010	808,851	945,138	856,921	764,643	1,064,359

LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Item	Year ending June 30—									
	1901	1902	1903	1904	1905	1906	1907	1908	1909	* 1910
Deductions from income: (total of items 1, 2, and 3 following)	7,091,757	6,980,222	6,307,633	5,907,095	5,940,251	6,426,014	6,559,167	6,006,532	6,841,763	6,867,892
1. Rents paid for lease of roads which form a part of the operating property.....	2,724,019	2,743,965	2,727,226	2,332,434	2,410,967	2,455,296	2,347,253	2,530,523	2,748,308	2,763,893
2. Rents paid to other roads for the partial use of road equipment and facilities needed in operating the property.....	706,919	536,293	562,258	574,384	444,471	430,176	373,895	185,833	150,806	173,270
3. Interest accrued on funded and floating debt.....	3,660,819	3,709,964	3,018,147	3,000,277	3,084,813	3,540,552	3,839,019	3,900,176	3,942,669	3,930,729
Corporate income for the year	Def. 1,139,815	Def. 1,332,777	2,377,247	5,720,651	6,804,459	7,021,810	8,093,543	7,432,647	5,843,804	8,137,400
Per cent on capital stock outstanding sec. C.	2.82	3.29	5.86	14.14	16.82	17.36	20.01	18.38	14.45	20.12
SEC. F. PROFIT AND LOSS ACCOUNT:										
Accumulated surplus brought forward from preceding year.....	77,014	Def. 1,176,238	Def. 3,372,147	1,620,681	5,914,796	8,657,325	11,380,915	14,009,283	16,516,904	19,212,252
Corporate income for the year	Def. 1,139,815	Def. 1,332,777	2,377,247	5,720,651	6,804,459	7,021,810	8,093,543	7,432,647	5,843,804	8,137,400
Discounts on securities bought and sold and other profit and loss allocations.....	-290,195	-861,112	+3,881,763	+38,554	-1,424,371	-1,103,971	-1,252,541	-719,069	-135,110	-397,617
Total surplus available for distribution.....	Def. 1,361,996	Def. 3,372,147	2,586,853	7,380,086	11,294,864	14,576,164	18,221,917	20,722,871	22,225,588	26,958,035
Per cent on capital stock outstanding sec. C.....	3.37	8.34	7.14	18.25	27.53	36.04	46.06	51.24	54.96	66.66
Dividends declared.....					1,225,989	1,624,022	2,144,044	2,450,703	2,450,703	2,430,703
Additions, betterments, and permanent improvement appropriations.....			1,266,182	1,405,290	1,411,550	1,570,227	2,008,590	1,903,834	580,206	843,877
Sinkings and special reserve funds.....	Cr. 183,728							411,430	2,487	Cr. 95,547
Total surplus appropriated	Cr. 183,728		1,266,182	1,405,290	2,637,539	3,194,249	4,212,134	4,203,967	3,033,346	261,747
Per cent on capital stock outstanding sec. C.....	.45		3.13	3.62	6.62	7.90	10.42	10.40	7.45	.65
Unappropriated surplus carried over to the following year.....	Def. 1,176,256	Def. 3,372,147	1,620,681	5,914,796	8,657,325	11,380,915	14,009,283	16,516,904	19,212,252	27,219,750

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The figures for years prior to 1901 are not given above because we have not had them revised to conform to the present system of accounting; but from 1895 onward they tell practically the same story—that is, the charges to maintenance of way from 1895 to 1904 were abnormal as compared with the years 1905 to 1910. During this 10-year period the density of tonnage per mile of line has increased about 30 per cent. Three of the large items of operating expenses, namely, maintenance of equipment; compensation to labor; and material, fuel and supplies, show an increase somewhat proportionate to the increase in density of tonnage; while the fourth large item of operating expense, maintenance of way and structures, has decreased from \$3,057 per mile in 1901 and \$3,340 in 1902 to \$2,404 in 1910. The only inference which can be drawn from these figures is that in the period from 1895 to 1902 the shareholders elected to devote surplus earnings to rebuilding and improving their road instead of distributing the earnings to themselves in the form of dividends. The excess of the maintenance of way item alone for several years prior to 1903 over that for 1910 was sufficient to pay a 2-per-cent. dividend on the stock. The devotion of earnings to permanent improvements and betterments was no doubt a wise policy on the part of those in control of the road. But the indications are that the shareholders have already received the benefit of that policy, even though it has not come in the form of cash dividends covering the period in question. From 1894 to 1903 the average market value of Lehigh Valley Railroad stock was in the neighborhood of \$75 per share. At this writing the same stock is quoted at \$178. Thus a person who had invested in Lehigh Valley at par prior to 1904, has benefited by an appreciation in value of his stock to the amount of 5 per cent. per annum since 1894 and has received dividends gradually increased from 2 per cent.

to 5 per cent. since 1905. The earnings in 1910 were sufficient to pay a dividend of 20.12 per cent., but the company elected to increase its unappropriated surplus from \$19,212,252 in 1909 to \$27,219,890 in 1910. Moreover, the Lehigh Valley Railroad Company has been carrying amongst its assets certificates of indebtedness of the Lehigh Valley Coal Company amounting to \$10,537,000, upon which no interest is collected. Interest on this indebtedness would be sufficient to pay a 1-per-cent. dividend on the stock. We should hesitate to assent to defendant's first proposition that present shippers must bear the burden of earlier misfortunes of the road, but it is unnecessary to decide that point in this case because it has been sufficiently demonstrated that the shareholders have received a fair return on their investment, taking into consideration the money actually received in dividends, the increased value of their shares, the increased value of the property, and the large unappropriated surplus. It follows therefore that the allowance in the Wilgus estimate of 10 cents per ton to make up for this alleged deficit should be eliminated from the calculation.

Defendant's second and third contentions that the rates should be sufficient to guarantee a fair annual return on the investment and to provide reasonably for keeping the property up to improved mod-

ern methods are sound but have little bearing on this case, in view of the summary of the road's finances above set forth. It will be noted by referring to that tabulation that defendant's corporate income was sufficient to pay a dividend on the capital stock of 16 per cent. in 1905, 17 per cent. in 1906, 20 per cent. in 1907, 18 per cent. in 1908, 14 per cent. in 1909, and 20 per cent. in 1910. Instead of paying such dividends it has paid 5 per cent. on its capital stock, appropriated to additions, betterments and improvements sums ranging from \$580,206 to \$2,068,590 per annum, and has increased its unappropriated surplus from nothing in 1902 to \$27,219.65 780 in 1910. Certainly it must be conceded that the present rates provide liberally for a fair annual return on the investment and the proper maintenance of the property.

As noted, the Lehigh Valley Railroad Company carries amongst its assets \$10,537,000 non-interest bearing certificates of indebtedness of the Lehigh Valley Coal Company. At 5 per cent. per annum the interest on these certificates would be \$526,850. The latter sum is in all substantial respects a rebate to the Lehigh Valley Coal Company. The proportion of the total tonnage from the anthracite field shipped by the Lehigh Valley Coal Company does not appear, but it is of record that it ships about 95 per cent. of the coal to tidewater. If its proportion of the total traffic is the same as that to tidewater, its tonnage for 1910 was in the neighborhood of 10,500,000 tons; and the net result of the transportation as between it and its competitors was the same as if it had had its coal transported for 5 cents per ton less than the independent dealers. Referring to the same matter in *Coxe Brothers Co. v. L. V. R. R. Co.*, supra, the Commission said:

The railroad company advances to the coal company nearly \$7,000,000 with which to transact its business, and for the use of which the railroad company receives no advantage other than such advantages as it gets from carrying the freight of the coal company. The value of the annual use of such advances at 5 per cent. interest amounts to \$350,000, nearly. This sum exceeds 10 cents per ton on all the coal shipped by the coal company over the lines of the railroad company, and is to that extent an undue preference given to said coal company, to the disadvantage of Coxe Brothers & Company and other shippers who receive no advances. The advantage of like advances if made to complainants, estimated on their annual 66 shipments, would exceed \$100,000. Had the Lehigh Valley road as a means of securing freight made like advances to any other competitor of complainants, whether an individual operator or a coal company in which the railroad company had no interest, it would hardly be contended that such act did not amount to undue preference and unjust discrimination. The fact that the road was interested in the coal company, as the owner of its capital stock does not make lawful what would be unlawful without such interest.

Defendant has filed an exhibit purporting to show that its average revenue for the transportation of coal to Perth Amboy from 1898 to 1908 has been \$1.46 per gross ton. Assuming that by the loan to the coal company defendant loses interest charges amounting roughly to 5 cents per ton, the average just given would be reduced to \$1.41

per gross ton. In the Coxe Brothers case, decided in 1891, the Commission decided that a fair return to defendant upon traffic here involved would be an average of \$1.40 per gross ton. The rates ordered as a result of that decision were never put in force because, while litigation resulting therefrom was in the courts, it was decided that as the law then stood the Commission was without authority to fix a rate for the future. Since that decision density of tonnage has increased, the ratio of operating expenses to income has materially decreased, grades have been eliminated, train loads and car capacities have materially increased; in short, every factor which ought to make for lower rates has been present. But the rates charged have produced revenue of about 6 cents per ton in excess of that found reasonable by the Commission.

Turning again to the Wilgus exhibit, we find the estimated cost of transporting a ton of coal from the Wyoming region to Perth Amboy is \$1.49. But we have shown that 10 cents of that

67 amount, designed to cover past deficits, is an improper charge.

Therefore \$1.39 would be the cost if the exhibit were accurately and properly constructed on the basis of facts known to the witnesses. In considering this exhibit it must be remembered that the so-called cost does not mean operating expense. The item of \$1.49 is designed to cover all proper, possible, and probable charges, including not only interest and depreciation charges, but other items, such as the 10-cent allowance above mentioned. Therefore, if the exhibit were not open to objection, it would be seen that, after eliminating the 10-cent charge above referred to, defendant's rates on the several sizes of anthracite coal ought to bring them revenue averaging \$1.39 per gross ton. That is to say upon defendant's own showing it is collecting rates which have been on the average 7 cents per ton in excess of a reasonable rate.

After a careful study of defendant's exhibits relating to tonnage and cost of movement, as well a painstaking analysis of defendant's voluminous exhibits respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy of 1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal, are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat. If the relative tonnage of the several sizes continues as it has in the past, the rates herein found to be reasonable would result in an average reduction in defendant's revenue per gross ton for hauling coal to Perth Amboy of about 11 cents below the figure of \$1.46 for the ten years from 1898 to 1908. As applied to 1908 the last year for which anthracite tonnage to Perth Amboy is shown in the record, the proposed rates would have resulted in reducing its operating revenue by

68 about \$247,000 and apparently 95 per cent. of this amount would accrue to the benefit of the railroad coal company. By reference to the table above set forth it is at once apparent that such a reduction will have no serious effect on defendant's revenues and will afford ample allowance for interest charges, operation, dividends, and all proper reserve funds.

We are further of opinion that reparation should be awarded upon

basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case can not be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants.

Order.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 8th Day of June, A. D. 1911.

Present:

Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

v.

LEHIGH VALLEY RAILROAD COMPANY.

69 This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby notified and required to cease and desist, on or before the 15th day of August, 1911, and for a period of two years thereafter to abstain from charging, demanding, collecting or receiving its present rates for the transportation of anthracite coal in carloads from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., as follows, to wit: upon prepared sizes \$1.55 per gross ton; on pea coal \$1.40 per gross ton; and on buckwheat coal \$1.20 per gross ton; which said rates have been found by the Commission in its said report to be unreasonable.

It is further ordered, That said defendant be, and it is hereby notified and required to establish, on or before the 15th day of August, 1911, and for a period of two years thereafter to maintain, and apply to the transportation of anthracite coal in carloads from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., rates not in excess of the following, to wit: \$1.40 per gross ton on prepared sizes of said coal; \$1.30 per gross ton on pea coal; and \$1.15 per gross ton on buckwheat coal; which said rates have been found by the Commission in its said report to be reasonable.

Order of Court.

Filed Sept. 3, 1912.

70 And now, Sept. 3, 1912, the petition of Henry E. Meeker, in the above proceeding having been filed and the averments thereof considered, it is ordered that the Lehigh Valley Railroad Company be and it is hereby directed and ruled to file a plea, answer or demurrer to said petition within twenty days of the service of a copy of said petition, together with a copy of this Order, or judgment sec. leg.

J. W. THOMPSON, *Judge.**Plea.*

Filed Oct. 5, 1912.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The defendant, the Lehigh Valley Railroad Company, for a plea in the above stated case pleads Not Guilty; and further pleads the bar of the Statutes of Limitation applicable to the plaintiff's claim; and for further plea in this behalf defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding, and further that there was before the Commission no substantial evidence to sustain said findings and said order.

E. H. BOLES,
Solicitor for Defendant.

143 Liberty Street, Borough of Manhattan, New York City.

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Jury.

And afterwards, to wit, on the twelfth day of November, 1912, a jury being called, comes, to wit:

Henry H. Gilbert
John H. Schwartz
J. H. Lits
W. G. Grosseup
J. M. Moser
John S. HoffJohn B. Stroh
Clement H. Koons
John W. Thompson
Arthur E. Richards
Louis Alexander
George W. Seaborn

who were respectively sworn or affirmed to try the issue joined.

Verdict.

And afterwards, to wit, on the 12th day of November, 1912, the jurors aforesaid, upon their oaths and affirmations, respectively do

say that they find for plaintiff and assess the damages in the sum of Thirteen Thousand, One Hundred Sixty-one and 78-100 (\$13,161.78) Dollars.

Bill of Exceptions.

Be it remembered that at said September Sessions came the said plaintiff into the said Court and impleaded the said defendant in a certain plea of trespass, etc., in which the said plaintiff declared prout narr and the said defendant pleaded "not guilty." And thereupon issue was joined between them.

And afterwards, to wit, at a session of the said Court held in the District aforesaid, before the Honorable James B. Holland, Judge of the said Court, on the twelfth day of November, 1912, the aforesaid issue between the said parties came to be tried by a jury of said

72 District for that purpose duly impaneled prout list of jurors at which date came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff and defendant respectively offered evidence as follows

Before Hon. James B. Holland, J., and a Jury.

PHILADELPHIA, PA., TUESDAY, November 12, 1912.

Present:

William A. Glasgow, Esq., and
John Henry Hall, Esq., representing the plaintiff.
Edward H. Boles, Esq.,
Everett Warren, Esq.,
Frank H. Platt, Esq., and
George W. Field, Esq., representing the defendant.

Jury sworn or affirmed November 12, 1912.

Evidence on Behalf of the Plaintiff.

HENRY EUGENE MEEKER, having been duly sworn, was examined as follows:

By Mr. GLASGOW:

Q. You are the plaintiff in this case?

A. Yes.

Q. Did you file a complaint before the Interstate Commerce Commission in 1910?

73 A. Yes.

Q. Setting up the complaint as to unreasonable rates from July 17, 1907, to the date of the filing of the complaint?

A. Yes.

Q. What was your business during that time?

A. I was buying and selling coal.

Q. Where was your office?

A. In New York City.

Q. How long had you and your father before you been in business of that kind?

A. For forty years; that is, my father before me.

Q. During that period from July 17, 1907, had you bought any coal in the Wyoming Region of Pennsylvania?

A. Yes.

Q. Particularly, what coal did you buy?

A. I bought mostly from the Stevens Coal Co.

Q. Did you ship any of that coal, from the period of July 17, 1907, to the date of the filing of the complaint before the Interstate Commerce Commission, to Perth Amboy?

Mr. FIELD: I might raise the objection here, in order to make it clear from the outset, that the period which Mr. Glasgow's questions are covering is from July 17, 1907, to April 13, 1910. The Commission specifically disallows claims arising from shipments between July 17, 1907, and two years before the date of the filing of the complaint in 1910, so that the questions now directed to the witness go back eight months beyond the date which the Commission allowed. I suggest that the questions be restricted to the subject matter of this action.

Mr. GLASGOW: If the gentleman will just permit me a moment, I was coming to the limitation which the Commission put upon the order, and I will do so now.

74 By Mr. GLASGOW:

Q. Then your complaint was filed on the 13th of April, 1910, was it not?

A. Yes, sir.

Q. And were you, for two years prior to that date, shipping coal over the Lehigh Valley Railroad from the Wyoming Region to Perth Amboy?

A. Yes.

Q. That goes back to the 13th of April, 1908?

A. Yes.

Q. Can you tell us what amount of coal of different sizes you shipped between the 13th of April, 1908, and the 13th day of April, 1910?

A. I cannot without making up the figures from this statement.

Q. It occurs in this Report. You can read it from the Report, if you wish.

A. 46,772.02 tons of prepared sizes; 26,972.06 tons of pea coal and 22,004.09 tons of buckwheat coal.

Q. Did you pay the freight on those tonnages shipped by you during that period?

A. Yes.

Q. At what rates did you pay?

A. At \$1.55 for prepared coal; that is, broken, egg, stove and chestnut.

Q. Prepared sizes?

A. Prepared sizes; \$1.40 for pea and \$1.20 for buckwheat.

Q. Your complaint before the Commission, as I understand, was that during that period from April 13, 1908, for two years, the rates were unjust and unreasonable?

A. Yes.

Q. Was a hearing had by the Commission on that question?

A. Yes.

Mr. FIELD: We object to that as a conclusion of the witness, whether the hearing was had on that question or not.

Mr. GLASGOW: It is merely introductory.

The COURT: You object to the question as to whether a hearing was had?

Mr. FIELD: I withdraw the objection. Mr. Glasgow states it is merely introductory.

By Mr. GLASGOW:

Q. I ask you if this is a report of the Interstate Commerce Commission with reference to the facts set up in your petition before the Commission? (Showing witness paper.)

A. It is.

Mr. GLASGOW: I offer this Report in evidence, being case No. 1180, Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, vs. Lehigh Valley Railroad Company, decided June 2, 1911; Report of the Interstate Commerce Commission.

Mr. FIELD: I understand that this offer is confined to the Report and not the order, although you have both in your hand?

Mr. GLASGOW: I also offer the order of the Commission in the same case between the same parties, dated the 8th day of June, 1907, and ask that they both be marked Plaintiff's Exhibit 1.

Mr. FIELD: If your Honor please, I object to the admission, first, of the Report which is now offered, as being not the Report in the proceeding which is specified in the petition in this action, but the Report which was found by the Commission in an entirely different proceeding.

The COURT: How is that? That this is not a Report the Commission made?

Mr. FIELD: Not in this proceeding. Your Honor will understand there were two proceedings before the Commission, the first one stopping with the period July 17, 1907, the next proceeding covering the period from April, 1908, to April, 1910. The offer now made in a suit brought setting up the order and Report in the second proceeding, of the Report, and the rate order as to future rates, in the first proceeding, and I object on the ground, first, that there is no authority in the Statute and no authority of law to offer as prima facie evidence, or for any purpose in this case, a Report of the Commission in a proceeding entirely separate from and

tinued from the proceeding which is referred to in the proceeding in this case before the Court now. I have further objections, if your Honor will pass on that.

The COURT: I do not understand you. The objection is raised that the Report is not prima facie evidence in a case not the same case, or in a case not brought on this Report? Is that the idea?

Mr. FIELD: This case is brought upon a Report and order dated May 7, 1912. Mr. Glasgow now proposes to put in evidence a Report dated June 8, 1911, made by the Commission in an entirely different proceeding before the Commission.

Mr. GLASGOW: If your Honor will permit me, I think I can explain the situation, which is somewhat confused by the statement of my friend. On July 17, 1907, a complaint was filed charging that these rates were unjust and unreasonable. While that case was pending before the Commission, the complaint in the case following was filed, attacking the rates from July 17th on. Now in the first Report the Commission said—in the Report which I have now offered, “In

77 a later complaint, filed April 13, 1910, No. 3235, styled Henry E. Meeker v. Lehigh Valley Railroad Company, complainant seeks reparation on the basis of a rate of one dollar on all grades of coal shipped during the period July 1, 1907, to April 1, 1910, alleging a total overcharge during said period of \$55,290.73. As the subject matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case.” Then when they came to make their Report in the second case, the supplemental Report, they made a joint Report in both cases as a supplemental Report, and they said: “On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant * * * were unreasonable”, etc. So that your Honor sees that the Commission bases its conclusion in the case that is now on trial upon the facts which it refers to as a part of its supplemental Report in the case running up to July 1, 1907. The whole transaction is one. As far as the order is concerned, the order which was entered on June 8, 1911, fixing what were reasonable rates, is the order which was in effect during the time covered by the second complaint.

The COURT: The Reports, the conclusions and the findings of fact in the Report are not what probably they might be for clearness, but it is not a proper thing that litigants should suffer by reason of any neglect of Government officials in inartistically or negligently drawing Reports, and, if the Interstate Commerce Commission draws a Report which substantially complies with the Act, it ought to be sustained, notwithstanding the fact that it shows a very negligent manner of treating the subject.

78 Objection overruled. Exception noted for defendant by direction of the Court.

(Papers marked Plaintiff's Exhibit No. 1, Nov. 12, 1912.)

Mr. FIELD: I object, if your Honor please, upon the further

ground that the Statute under which the Report is offered in evidence, Interstate Commerce Act, Section 16, is unconstitutional in that it deprives the defendant of due process of law.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The Report is invalid because, on its face, it purports to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The alleged findings of the Commission are invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The findings take from the Court its judicial power to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and, further, in effect impose upon this Court as evidence in this case that which is not legal evidence, and, further, to impose upon this Court as findings of the Commission, conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

79 Mr. FIELD: Because it contains no findings of fact, as required by the statute. It contains not a single finding upon which a reparation award can be based, or which is material or relevant in a reparation suit.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: Because it contains many statements, purporting to be statements of evidence on the hearing before the Interstate Commerce Commission, arguments, opinions and conclusions, which the statute does not purport to make admissible as *prima facie* evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: Because the statements contained in the Report, if held to be findings of fact, are so confused with other matter as not to be distinguishable or separable.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The Report has no effect or competency in connection with an action for damages, because it does not set forth the alleged causes of action of which the award purports to be made up. In fact, the original Report specifically reserves all such statements to a subsequent order.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: I would like to make further the general objection that the Report is incompetent as evidence in this case.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: Now as to the order of June 8, 1911, offered
80 at the same time, I make the same objection, to the effect that
that is an order in a proceeding brought before the Commission
which is not the proceeding set forth in the petition in this case,
but an entirely different proceeding, and that there is no authority
in the Act or any authority in law for introducing in this suit now
before the Court an order of the Commission in that proceeding,
either as prima facie evidence or for any other purpose.

Objection overruled. Exception noted for defendant by direction
of the Court.

Mr. FIELD: I also would like to make the same objections to the
order and have exceptions noted that I have just made as to the
Report.

The COURT: Let it be understood that the objections made to the
Report also apply to the order and that the objections are overruled
and an exception noted for the defendant as to each objection.

Mr. FIELD: I make the general objection that the order is irrelevant
and incompetent in this case.

Objection overruled. Exception noted for defendant by direction
of the Court.

By Mr. GLASGOW:

Q. I read you the following sentence from the Report of the Commission
on June 8, 1911: "We are of opinion and so find that defendant's rates
for the transportation of coal from the Wyoming Region to Perth Amboy
of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20
on buckwheat coal are unreasonable so far as they exceed \$1.40 on
prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat." Have
you made up a statement showing the amount of damage that you claim
on the basis of the difference between the rates which the Commission
found to be unreasonable and the rates which they prescribe as the
reasonable rates on the several amounts of coal which you shipped from
81 the period April 13, 1908, to April 13, 1910?

A. Yes.

Q. What is that amount?

Mr. FIELD: I object to that as a conclusion, the proper evidence
under the circumstances being the separate shipments and the separate
causes of action on which the petition is brought for recovery, and
the mere statement in bulk of one item is a legal conclusion and not
evidence of any fact.

Objection overruled. Exception noted for defendant by direction
of the Court.

By Mr. GLASGOW:

Q. Will you please state the amount?

A. \$10,813.60.

Q. Have you also calculated the interest upon each shipment, the
excess paid upon each shipment during that period from the time
of the payment thereof to September 1, 1911?

Mr. FIELD: I make the same objection to that, on the ground that there is no statement as to what the shipments were, or no proof of each shipment, or no proof to base such conclusions upon.

The COURT: See whether he has the basis.

Mr. GLASGOW: I am going to follow that right along. If he will state the amount, I will ask him how he got it.

The COURT: If it is followed up by proof of the basis upon which it was made and where it was obtained, it is admitted.

By Mr. GLASGOW:

Q. What amount?

A. \$1,526.53.

82 Q. Did you have made up a statement of each shipment and the amount paid thereon weekly, and the excess paid by you over the amount found by the Commission as a reasonable rate?

A. I did.

Q. Also the interest upon each excess amount from the time it was paid up to September 1, 1911?

A. Yes.

Q. Did you submit that statement to the Lehigh Valley Railroad Company?

A. Yes.

Q. Did they go over it?

A. They did.

Q. Did they make any statement to you as to whether it was correct or not?

Mr. FIELD: I object to that on the same ground, as an attempt to prove in the aggregate as a conclusion, and without any foundation for the conclusion, the aggregate of all his causes of action, without proving, as he should in this case, the causes of action upon which he sues.

Mr. GLASGOW: I am coming to that as soon as I can.

By Mr. GLASGOW:

Q. Did they say anything about the correctness of it?

A. They approved these figures and acknowledged them as correct.

Q. That the excess of the rates as shown over the Commission's finding and the interest as stated in that statement was correct?

A. Yes.

Q. Then did you submit that statement to the Interstate Commerce Commission?

A. Yes.

Q. And did they have a hearing upon the question of the amount of reparation?

83 A. Yes.

Mr. GLASGOW: Now, if your Honor please, I offer the supplemental Report of the Interstate Commerce Commission in case No. 3235, Henry E. Meeker vs. Lehigh Valley Railroad Company, de-

cided May 7, 1912, and the order thereto attached in the same case, a certified copy of it, and ask that it be marked Plaintiff's Exhibit No. 2.

Mr. FIELD: I object to the Report and order as incompetent evidence in this case.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The statute under which the Report is offered in evidence, Interstate Commerce Act, Section 16, is unconstitutional, in that it deprives the defendant of due process of law.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The Report is invalid, because on its face it purports to regulate commerce which was completed before the time that the order was made, and is, therefore, not subject to the regulation.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The alleged findings of the Commission are invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The findings take from the Court its judicial power to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and
84 further, in effect impose upon this Court as evidence in this case, that which is not legal evidence, and further, to impose upon this Court as findings of the Commission, conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: It appears on the face of the Report and order that there was no evidence before the Commission on which it could base a conclusion as to the reasonableness of the rates in this suit.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That the Report contains no finding of fact as required by the Statute.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That the Report contains conclusions and opinions which the statute does not purport to make admissible as prima facie evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: If there are any findings of fact in the Report, they are so confused with other matters as not to be distinguishable or separable.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That the Report does not set forth the alleged causes

of action on which the award purports to be made up. It simply gives as a conclusion the total tonnage, the total freight payments, and does not set forth a single cause of action.

85 Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That it appears on the face of the Report that the total amount of the award by the Commission to be paid was the sum of several amounts claimed on several separate shipments; that each of such shipments is the basis of a separate cause of action, and the Report is inadmissible as not specifying in each the amount of the award by the Commission. The Report fails to state as to each cause of action the amount found due by the Commission, and, therefore, the Report is not, under Section 16, *prima facie* evidence as to any of the causes of action here sued upon.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: I make the further objection to the supplemental Report, dated May 7, 1912, in so far as the subject matter upon the first page and also that on the second page relating to action before the Commission, No. 1180. The Report is a composite Report, covering, as it purports to on its face, two separate proceedings, half of the Report dealing with one proceeding and the other half with the other and I make the objection that that part of the Report which relates to the foreign proceeding is not relevant in this case.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: I further object to the admission of the order offered on the ground that it is not competent evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That the statute under which the order is
86 offered in evidence, Interstate Commerce Act, Section 16, is unconstitutional, in that it deprives the defendant of due process of law.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The order of the Commission is invalid and unconstitutional, in that it has the effect to deprive the defendant of its constitutional right to a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The order takes from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and further, in effect impose upon this Court as evidence in this case, that which is not legal evidence, and further, to impose upon this Court as findings of the Commission conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The order is invalid because, on its face, it purports to regulate commerce which was completed before the time when

the order was made, and which, therefore, was not subject to regulation.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The power to regulate commerce does not include the power to dispose of the proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past.

87 Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: It appears on the face of the Report and order that there was no evidence before the Commission on which it could base a conclusion as to the reasonableness of the rates involved in this suit.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The award made in the reparation order is not based on findings of fact required by the Act, as the Act requires that "in case damages are awarded, such Report shall include the findings of fact on which the Report is made." The Report contains no findings of fact to support the conclusions that any of the rates charged the plaintiff were unreasonable.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: It appears on the face of the order that the total amount found by the Commission to be the amount of the alleged damages was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907, that each of such shipments is the basis of a separate cause of action, and the order is inadmissible as not specifying as to each the amount awarded by the Commission; that the order fails to state as to each judgment the amount found due by the Interstate Commerce Commission; therefore, the order is not, under Section 16, prima facie evidence as to any of the causes of action here sued upon.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. GLASGOW: In offering the Report, I offer it as a whole,

88 and I ask that the jury consider in that Report, and ask your Honor to direct that they consider only such parts as I now read, because that is the part which is pertinent to this inquiry. The Report is entitled both in case 1180 and 3235 heard together, in which they say:

"The original Report in No. 1180, 21 I. C. C. 129, disposed of all the questions at issue except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature. A further hearing has been held, and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct."

I omit, if your Honor please, from that point down to near the bottom of page 481.

(Beginning with the words, "With the exception of the reparation features," at the bottom of page 481, Mr. Glasgow read the remainder of the supplemental Report to the bottom of page 482, closing with the words, "Orders will be issued in accordance with the findings herein announced.")

Mr. GLASGOW: That is the part of the Report which I ask to be submitted. The orders of the Commission directing the payment of the amount found in this supplemental Report, which I have just read, follow that report and direct the payments to be made, and I have already read that to the jury.

In my offer of this Exhibit No. 2 I inadvertently offered, as a part of it, the order in case No. 1180. I wish that to be withdrawn and not to be considered by the jury, leaving the offer the supplemental Report, so far as I have read it, and the order in case No. 3235.

89 (Papers marked Plaintiff's Exhibit 2, November 12, 1912.)

Mr. GLASGOW: It is admitted by counsel for the defendant, as I understand, that these Reports and orders which I have offered in evidence were duly served upon the defendant, and I will state the dates, if desired: That Exhibit No. 1 was duly served upon the defendant on July 1, 1911, and that Exhibit No. 2 was served upon the defendant on May 25, 1912.

Mr. FIELD: The defendant makes that admission.

By Mr. GLASGOW:

Q. In this order of the Commission which I have read, the order of the Commission of May 7, 1912, the defendant was ordered to pay to you the sum of \$10,813.60, with interest at the rate of six per centum per annum, amounting to \$1,526.53, as of September 1, 1911, with interest on \$10,813.60 after September 1, 1911. Has that sum, or the interest, or any part of it, been paid to you?

A. No.

Q. Were the freight rates during the period April 13, 1908, to April 13, 1910, paid by you to the Lehigh Valley Railroad Company?

A. Yes.

Cross-examination.

By Mr. FIELD:

Q. You referred at the beginning of your examination to a statement which you filed with the Commission, being the same statement which you checked over, or had your assistant check over, with the accounting officers of the defendant railroad. I show you a statement and ask you if that is one of the carbon copies of the original statement which you referred to?

A. Yes.

90

Q. The supplemental Report, Exhibit 2, and also the reparation order in this case; also a part of Exhibit 2, refer to

schedule of shipments filed with the Commission, the order referring to it as Exhibit 1. Is that the paper so referred to?

A. Yes.

Q. This paper includes, does it not, shipments prior to the period covered by this suit; that is to say, shipments between July 23, 1907, and April 23, 1908?

A. Yes.

Q. But the shipments stated on this paper subsequent to April 23, 1908, represent the shipments which are the subject matter of this suit, do they not, from April 23, 1908, to February 2, 1910?

A. Yes.

Q. And those are the shipments that are included in the order of the Commission, Exhibit 2, in this case?

A. I do not know about the number of the exhibit.

Mr. FIELD: It is your Exhibit 2, Mr. Glasgow.

The WITNESS: Oh, in this case? Yes.

The COURT: I understood the shipments ran from the 13th of April, 1908, to the 13th of April, 1910.

Mr. FIELD: Mr. Meeker shipped nothing after February 2d.

The COURT: They began only on the 23d?

Mr. FIELD: No; he had some prior shipments, but they were barred by the statute.

By Mr. FIELD:

Q. The footings on this shipment carry forward all shipments from July 17th?

A. Yes.

Q. So that the final footing on the last page includes not only the shipments covered by the Commission's order, Exhibit 2 in 91 & 92 this case, but all shipments from July 23, 1907? The footings cover all shipments?

A. Yes.

Plaintiff Rests.

Evidence on Behalf of Defendant.

Mr. FIELD: I offer in evidence the schedule referred to by the petitioner's witness, Mr. Meeker, referring only to that part of the schedule covering shipments between April 13, 1908, and the end of the schedule, covering the date, February 2, 1910, with the further statement on the record that Mr. Meeker testified that the footings were not in accordance with the order, because they include previous amounts. That is very clear by Mr. Meeker's testimony. In other words, to get the footing in the order, you have to deduct from the footing in this exhibit the shipments which are omitted from this exhibit because barred by the two-year statute.

Mr. GLASGOW: And that was what was done by the Commission.

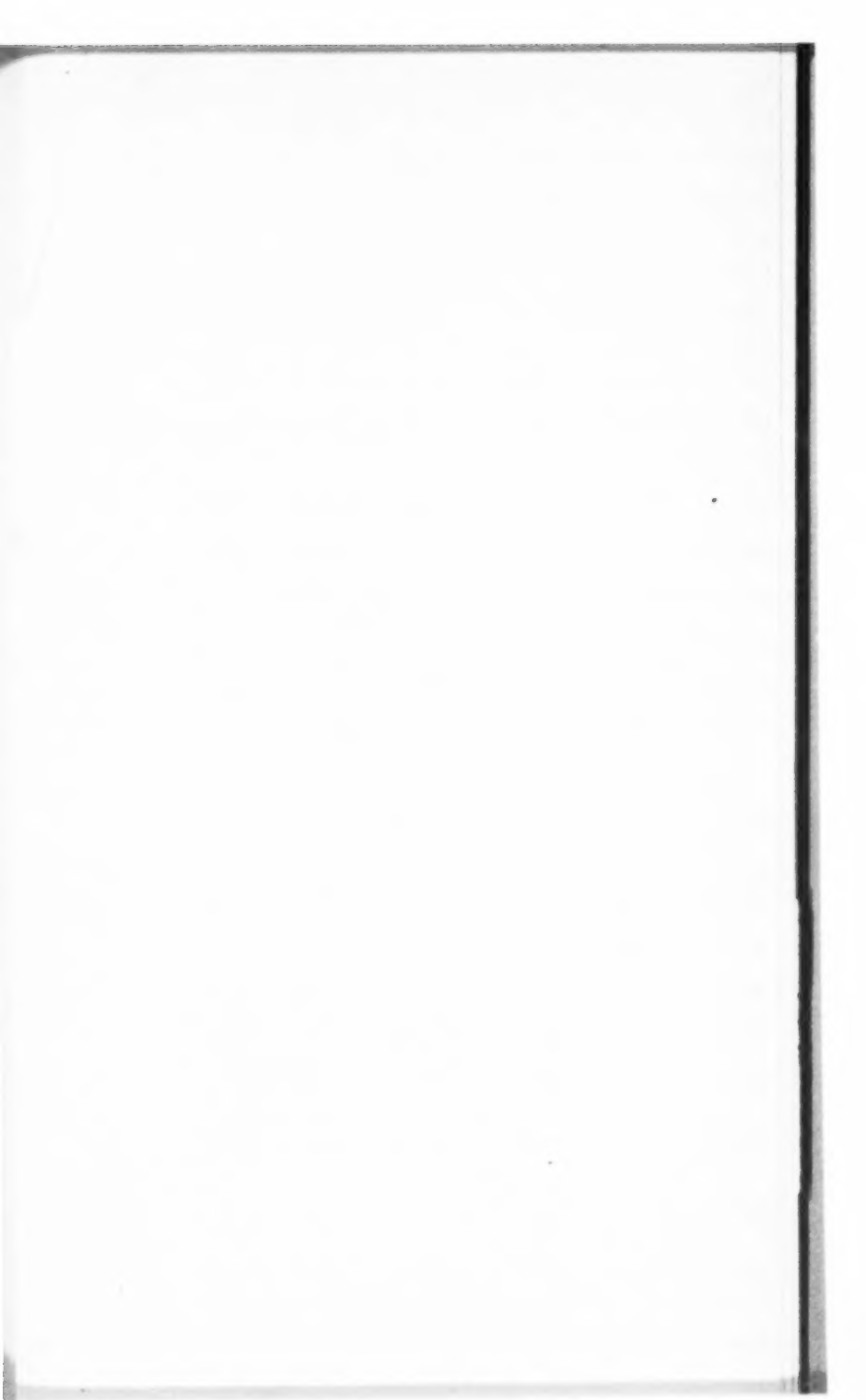
Mr. FIELD: That was what was done by the Commission. I would

also like to state on the record, with Mr. Glasgow's consent, that the fourth column from the last, being as to the first item on the exhibit covering the shipment April 23, 1908, the item 4-25, refers to the date when Mr. Meeker paid the draft for that shipment; in other words, that the bill of April 23, 1908, was paid by the acceptance of a draft on April 25, 1908, by draft meaning the company's draft on Mr. Meeker for the freight.

(Schedule marked Defendant's Exhibit A, November 12, 1912.)
Defendant Rests.

Testimony Closed.

(Here follow pasters marked pages 93 to 110.)



								To Sep. 1, 1911.			
	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest	
July 23, 1907 25		88.05		123.55.	123.55	114.72	114.72	8.83	7/26 4	36 2.17	
Aug. 2, 1907 26	666.15			1,033.46		933.45					
Aug. 9, 1907 27	465.18	402.17		563.99	1,597.45	523.70	1,457.15	140.30	8/8 4	23 34.20	
Aug. 16, 1907 28	962.07	67.13		722.15		652.26					
Aug. 23, 1907 29	559.15	155.08		94.71	816.86	87.95	740.21	76.65	8/13 4	18 18.63	
Sep. 2, 1907 30	665.17			1,491.64		1,347.29					
Sep. 9, 1907 31	300.19			217.56	1,709.20	202.02	1,549.31	159.89	8/21 4	10 38.64	
Sep. 16, 1907 32	526.00			867.61	867.61	783.65	783.65	83.96	8/27 4	4 20.21	
Sep. 23, 1907 33	644.19			1,032.07	1,032.07	932.19	932.19	99.88	9/7 3	358 23.95	
Oct. 2, 1907 34	1,631.00			466.47	466.47	421.33	421.33	45.14	9/13 3	352 10.77	
Oct. 9, 1907 35	92.05			815.30	815.30	736.40	736.40	78.90	9/19 3	346 18.76	
Oct. 16, 1907 36	512.01			999.67	999.67	902.93	902.93	96.74	9/26 3	339 22.89	
Oct. 23, 1907 37	732.01			2,528.05	2,528.05	2,283.40	2,283.40	244.65	10/8 3	327 57.39	
Nov. 2, 1907 38	363.15	425.15		142.99	142.99	129.15	129.15	13.84	10/12 3	323 3.24	
Nov. 9, 1907 39	44.18	122.06		793.68	793.68	716.87	716.87	76.81	10/19 3	316 17.87	
Nov. 16, 1907 40	304.16		204.00	1,134.68	1,134.68	1,024.87	1,024.87	109.81	10/26 3	309 25.43	
Nov. 23, 1907 41	180.05		25.02	563.81		509.25					
Dec. 3, 1907 42	960.07			596.05		553.47					
Dec. 10, 1907 43	540.19			245.16	1,405.02	234.94	1,297.66	107.36	11/9 3	295 24.58	
Dec. 17, 1907 44	503.13			69.60		62.86					
Dec. 24, 1907 45	544.01	29.02		171.22		158.99					
Jany. 2, 1908 46	1,278.17	26.04		30.12	270.94	28.86	250.71	20.23	11/12 3	292 4.61	
Jany. 9, 1908 47-1	156.16	185.13		472.44	472.44	426.72	426.72	45.72	11/19 3	285 10.42	
Jany. 16, 1908 48-2	251.05		24.18	279.39	279.39	252.35	252.35	27.04	11/26 3	278 6.12	
Jany. 23, 1908 3	116.18			1,488.54	1,488.54	1,344.49	1,344.49	144.05	12/7 3	267 32.34	
				838.47	838.47	757.33	757.33	81.14	12/12 3	262 18.15	
				780.66	780.66	705.11	705.11	75.55	12/19 3	255 16.82	
				843.28		761.67					
				40.74	884.02	37.83	799.50	84.52	12/27 3	247 18.71	
				1,982.22		1,790.39					
				36.68		34.06					
				565.50	2,584.40	541.93	2,366.38	218.02	1/9 3	234 47.74	
				243.04		219.52					
				259.91		241.34					
				29.88	532.83	28.63	489.49	43.34	1/11 3	232 9.46	
				389.44	389.44	351.75	351.75	37.69	1/20 3	223 8.19	
				181.20	181.20	163.66	163.66	17.54	1/25 3	218 3.81	

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	13,006.07	1,503.03	725.11		23,134.93		20,997.33	2,137.60		495.10
Feby. 2, 1908	1,427.18			2,213.25		1,999.06				
4		360.00		504.00		468.00				
			812.10	975.00	3,692.25	934.37	3,401.43	290.82	2/8 3 204	62.24
Feby. 9, 1908	274.09			425.40		384.23				
5		116.01		162.47	587.87	150.86	535.09	52.78	2/12 3 200	11.27
Feby. 16, 1908	28.12			44.33		40.04				
6		312.07		437.29	481.62	406.05	446.09	35.53	2/20 3 192	7.55
Feby. 23, 1908		410.09		574.63	574.63	533.58	533.58	41.05	2/27 3 185	8.65
7										
Mch. 3, 1908	957.09			1,484.05		140.43				
8		650.07		910.49		345.45				
			386.03	463.38	2,857.92	444.07	2,629.95	227.97	3/7 3 177	47.76
Mch. 10, 1908	628.12			974.33		880.04				
9		72.12		101.64		94.38				
			21.10	25.80	1,101.77	24.72	999.14	102.63	3/12 3 172	21.43
Mch. 17, 1908		162.19		228.13	228.13	211.83	211.83	16.30	3/19 3 165	3.37
10										
Mch. 24, 1908	939.07			1,455.99		1,315.09				
11		214.11		300.37	1,756.36	278.91	1,594.00	162.36	3/26 3 158	33.49
Apl. 2, 1908	3,517.13			5,452.36		4,924.71				
12		513.11		718.97		667.61				
			406.15	488.10	6,659.43	467.76	6,060.08	599.35	4/9 3 144	22.25
Apl. 9, 1908	852.13			1,321.61		1,193.71				
13		38.17		54.39		50.50				
			71.08	85.68	1,461.68	82.11	1,326.32	135.36	4/11 3 142	27.56

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time Yrs. Days.	Interest
Forward	21,633.00	4,354.17	2,423.17		42,536.59		38,734.84	3,801.75		840.67
Apl. 23, 1908	108.05			167.79		151.55				
15		523.11		732.97	900.76	680.61	832.16	68.60	4/25 3 128	13.82
May 2, 1908	152.05			235.99		213.15				
16		92.02		128.94	364.93	119.73	332.88	32.05	5/6 3 117	6.39
May 9, 1908	120.15			187.16	187.16	169.05	169.05	18.11	5/11 3 112	3.60
17										
May 16, 1908	471.10			730.83		660.10				
18		96.06		134.82		125.19				
			30.10	36.60	902.25	35.07	820.36	81.89	5/19 3 104	16.16
May 23, 1908	622.03			964.33		871.01				
19		475.19		666.33	1,630.66	618.73	1,489.74	140.92	5/26 3 97	27.64
June 2, 1908	365.14			566.84		511.98				
20		444.01		621.67	1,188.51	577.26	1,089.24	99.27	6/6 3 86	19.22
June 9, 1908	665.10			1,031.53	1,031.53	931.70	931.70	99.83	6/11 3 81	19.32
21										
June 16, 1908	1,086.06			1,683.77		1,520.82				
22		392.13		549.71		510.44				
			333.08	400.08	2,633.56	383.41	2,414.67	218.89	6/18 3 74	42.10

Forward	25,225.08	6,379.09	2,787.15	95	46,814.64	4,561.31	988.99
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TORN PAGES

	Prepared	Pea.	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	25,225.08	6,379.09	2,787.15		51,375.95		46,814.64	4,561.31		988.99
June 23, 1908	711.02			1,102.21		995.54				
23		366.16		513.52		476.84				
July 2, 1908	75.05		321.01	385.26	2,000.99	369.20	1,841.58	159.41	6/25 3 67	30.47
24		1,049.11		116.64		105.35				
July 16, 1908	908.14		765.00	1,469.37	2,504.01	1,364.41	2,349.51	154.50	7/10 3 52	29.16
25				918.00	1,408.49	1,272.18	1,272.18	136.31	7/18 3 44	25.53
July 23, 1908	1,057.04			1,638.66		1,480.08				
26		597.05		836.15	2,474.81	776.42	2,256.50	218.31	7/25 3 37	40.64
Aug. 2, 1908	1,381.17			2,141.87		1,934.59				
27		768.08		1,075.76		998.92				
Aug. 9, 1908		269.16	428.02	513.72	3,731.35	492.32	3,425.83	305.52	8/8 3 23	56.16
28				377.72		350.74				
Aug. 16, 1908		165.16	165.06	198.36	576.08	190.09	540.83	35.25	8/13 3 18	6.46
29				232.12	232.12	215.54	215.54	16.58	8/20 3 11	3.01
Aug. 23, 1908		378.15		530.25	530.25	492.38	492.38	37.87	8/27 3 04	6.85
30										
Sept. 2, 1908	89.17			139.27		125.79				
31		943.05		1,320.55		1,226.22				
Sept. 9, 1908		263.02	42.00	50.40	1,510.22	48.30	1,400.31	109.91	9/9 2 356	19.71
32				368.34	368.34	342.03	342.03	26.31	9/12 2 353	4.69
Sept. 16, 1908	48.17			75.72		68.39				
33		483.05		676.55		628.22				
Sept. 23, 1908		79.13	213.07	256.02	1,008.29	245.35	941.96	66.33	9/19 2 346	11.77
34				111.51	111.51	103.54	103.54	7.97	9/26 2 339	1.41
Oct. 2, 1908		888.03		1,243.41		1,154.59				
35			516.04	619.44	1,862.85	593.63	1,748.22	114.63	10/10 2 325	19.99
Oct. 9, 1908		27.14		38.78		36.01				
36			84.18	101.88	140.66	97.63	133.64	7.02	10/13 2 322	1.22
Oct. 16, 1908		164.18		230.86	230.86	214.37	214.37	16.49	10/20 2 315	2.82
37										
Oct. 23, 1908	276.06			428.27		386.82				
38		511.11		716.17		665.01				
Nov. 2, 1908	1,527.00		79.12	95.52	1,239.96	91.54	1,143.37	96.59	10/27 2 308	16.57
39		859.11		2,366.85		2,137.80				
Nov. 9, 1908	310.02		625.05	1,203.37	4,320.52	1,117.41	3,974.25	346.27	11/10 2 294	58.50
40		160.08		750.30		719.04				
Nov. 17, 1908	93.01		110.09	480.66	837.76	434.14	769.68	68.08	11/12 2 292	11.47
41				224.56		208.52				
Nov. 23, 1908				132.54		127.02				
42			222.07	144.23	411.05	255.70	385.97	25.08	11/19 2 285	4.20
			91.07	266.82	109.62	105.05	105.05	4.57	11/26 2 278	.78

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	31,704.13	14,357.06	6,452.13		76,985.69		70,471.38	6,514.31		1,340.40
Dec. 2, 1908	821.00			1,272.55		1,149.40				
43		84.16		118.72		110.24				
			355.12	426.72	1,817.99	408.94	1,668.58	149.41	12/8 2 266	24.53
Dec. 9, 1908	1,112.19			1,725.07		1,558.13				
44		85.15		120.05	1,845.12	111.47	1,669.60	175.52	12/12 2 262	28.74
Dec. 16, 1908	167.07			259.39		234.29				
45		126.13		177.31		164.64				
			48.06	57.96	494.66	55.55	454.48	40.18	12/19 2 255	6.52
Dec. 23, 1908	476.03			738.03		666.61				
46		42.19		60.13	798.16	55.83	722.44	75.72	12/26 2 248	12.23
Jan. 2, 1909	1,611.11			2,497.90		2,256.17				
47		532.01		744.87		691.66				
			272.19	327.54	3,570.31	313.89	3,261.72	308.59	1/9 2 234	49.08
Jan. 9, 1909	225.19			350.22		316.33				
48-1		296.09		415.03		385.38				
			183.03	219.78	985.03	210.62	912.33	72.70	1/12 2 231	11.53
Jan. 16, 1909	741.15			1,149.71	1,149.71	1,038.45	1,038.45	111.26	1/19 2 224	17.49
49-2										
Jan. 23, 1909	484.04			750.51		677.88				
3		82.03		115.01	865.52	106.80	784.68	80.84	1/26 2 217	12.63
Feb. 2, 1909	2,675.10			4,147.03		3,745.70				
4		658.08		921.76		855.92				
			416.08	499.68	5,568.47	478.86	5,090.48	487.99	2/9 2 203	75.07
Feb. 9, 1909	173.01			268.23		242.27				
5			41.17	50.22	318.45	48.13	290.40	28.05	2/11 2 201	4.31
Feb. 16, 1909	346.00			536.30		484.40				
6		134.06		188.02	724.32	174.59	658.99	65.33	2/17 2 195	9.95
Feb. 23, 1909	178.08			276.52		249.76				
7		186.14		261.38	537.90	242.71	492.47	45.43	2/25 2 187	6.85
Mch. 2, 1909	337.13			523.36		472.71				
8		235.02		329.14		305.63				
			360.11	432.66	1,285.16	414.63	1,192.97	92.19	3/6 2 178	13.79
Mch. 9, 1909	222.11			344.95		311.57				
9		42.00		58.80	403.75	54.60	366.17	37.58	3/11 2 173	5.61
Mch. 16, 1909	574.07			890.24	890.24	804.09	804.09	86.15	3/18 2 166	12.72
10										
Mch. 23, 1909			67.00	80.40	80.40	77.05	77.05	3.35	3/25 2 159	.48
11										
Apr. 2, 1909	535.03			829.48		749.21				
12		622.05		871.15		808.92				
			796.13	955.98	2,656.61	916.15	2,474.28	182.33	4/8 2 145	26.27

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
Forward	42,388.04	17,486.17	8,995.02		109,977.49		92,420.56	8,556.93	Yrs. Days.	1.658.20
Apl. 9, 1909		136.09		191.03		177.38				
13			27.06	32.76	223.79	31.40	208.78	15.01	4/13 2 140	2.15
Apl. 16, 1909	264.00			409.20		369.60				
14		581.03		813.61		755.50				
Apl. 23, 1909	45.02		302.12	363.12	1,585.93	347.99	1,473.09	112.84	4/20 2 132	16.04
15		532.00		69.91		63.14				
				744.80		691.60				
May 2, 1909		1,198.05	392.02	470.52	1,285.23	450.91	1,205.65	79.58	4/27 2 126	11.23
16				1,677.55		1,557.72				
May 9, 1909		46.01	800.14	960.84	2,638.39	920.80	2,478.52	159.87	5/8 2 115	22.25
17				64.47		59.86				
May 16, 1909	184.11		73.13	88.38	152.85	84.70	144.56	8.29	5/13 2 110	1.14
18		759.13		286.05		258.37				
				1,063.51		987.54				
May 23, 1909	89.12		637.07	764.82	2,114.38	732.95	1,978.86	135.52	5/20 2 103	18.59
19		401.19		138.88		125.44				
				562.73		522.51				
June 2, 1909	86.15		292.07	350.82	1,062.43	336.20	984.18	68.25	5/27 2 96	9.28
20				134.46	134.46	121.45	121.45	13.01	6/8 2 84	1.74
June 16, 1909	699.00			1,083.45		978.60				
21		574.19		804.93		747.43				
			502.14	603.24	2,491.62	578.10	2,304.13	187.49	6/19 2 73	24.78
June 23, 1909	1,379.16			2,138.69		1,931.72				
22		770.09		1,078.63		1,001.58				
			836.19	1,004.34	4,221.66	962.49	3,895.79	325.87	6/26 2 66	42.69
July 1, 1909	1,197.18			1,856.75		1,677.06				
23		925.16		1,296.12		1,203.54				
			925.13	1,110.78	4,263.65	1,064.49	3,945.09	318.56	7/10 2 52	40.99
July 8, 1909	180.06			279.47		252.42				
24		73.06		102.62		95.29				
			26.11	31.86	413.95	30.53	378.24	35.71	7/13 2 49	4.58
July 16, 1909	719.16			1,115.69		1,007.72				
25		255.01		357.07		331.56				
			439.02	526.92	1,999.68	504.96	1,844.24	155.44	7/20 2 42	19.74
July 23, 1909	908.17			1,408.72		1,272.39				
26		425.18		596.26		553.67				
			647.18	777.48	2,782.46	745.08	2,571.14	211.32	7/27 2 35	26.59
Aug. 2, 1909	2,396.16			3,715.04		3,355.52				
27		936.00		1,310.40		1,216.80				
			1,106.00	1,327.20	6,352.64	1,271.90	5,844.22	508.42	8/10 2 21	62.79

Forward	50,540.13	25,103.16	16,006.00		132,690.61		121,798.50	10,892.11		1,962.78
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time Interest	
									Yrs. Days	
Forward	50,540.13	25,103.16	16,006.00		132,690.61		121,798.50	10,892.11		1,962.78
Aug. 10, 1909	341.07			529.09		477.89				
28		257.13		360.71		334.94				
			319.03	382.98	1,272.78	367.02	1,179.85	92.93	8/12 2 19	11.44
Aug. 17, 1909	356.05			552.19		498.75				
29		246.19		345.73		321.03				
			173.09	208.14	1,106.06	199.46	1,019.24	86.82	8/19 2 12	10.59
Aug. 24, 1909	72.01			111.68		100.87				
30		159.02		222.74		206.83				
			64.10	77.40	411.82	74.17	381.87	29.95	8/26 2 5	3.62

Forward	51,310.06	25,767.10	16,563.02	135,481.27	124,379.46	11,101.81	1,988.43
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	51,310.06	25,767.10	16,563.02		135,481.27		124,379.46	11,101.81		1,988.43
Sept. 2, 1909	1,411.08			2,187.67		1,975.96				
31		1,006.12		1,409.24		1,308.58				
			1,456.05	1,747.50	5,344.41	1,674.69	4,959.23	85.18	9/9 1 356	45.95
Sept. 9, 1909	266.10			413.08		373.10				
32		305.02		427.14		396.63				
			232.17	279.42	1,119.64	267.77	1,037.50	82.14	9/11 1 354	9.77
Sept. 16, 1909	624.19			968.67		874.93				
33		257.09		360.43		334.68				
			381.05	457.50	1,786.60	438.44	1,648.05	38.55	9/18 1 347	16.34
Sept. 23, 1909	872.10			1,352.38		1,221.50				
34		422.07		591.29		549.05				
			479.08	575.28	2,518.95	551.31	2,321.86	197.09	9/25 1 340	22.98
Oct. 2, 1909	1,794.18			2,782.10		2,512.86				
35		418.06		585.62		543.79				
			834.18	1,001.88	4,339.60	960.13	4,016.78	352.82	10/9 1 326	40.35
Oct. 9, 1909	188.04			291.71		263.48		28.23	10/12 1 323	3.20
36										
Oct. 16, 1909	412.15			639.76		577.85				
37		123.04		172.48		160.16				
			81.06	97.56	909.80	93.49	831.50	78.30	10/19 1 316	8.80
Oct. 23, 1909	446.05			691.69		624.75				
38		206.10		289.10		268.45				
			240.14	288.84	1,269.63	276.80	1,170.00	99.63	10/26 1 309	11.13
Nov. 2, 1909	1,179.14			1,828.54		1,651.58				
39		268.05		375.55		348.72				
			346.16	416.16	2,620.25	398.82	2,399.12	221.13	11/10 1 294	24.10
Nov. 9, 1909	347.06			538.32		486.22				
40			83.13	100.38	638.70	96.20	582.42	56.28	11/11 1 293	6.11
Nov. 16, 1909	627.10			972.63		878.50				
41		195.00		273.00		253.50				
			179.18	215.88	1,461.51	206.88	1,388.88	122.63	11/18 1 286	13.23
Nov. 23, 1909	714.03			1,106.93		999.81				
42		344.13		482.51		448.04				
			228.19	274.74	1,864.18	263.29	1,711.14	153.04	11/26 1 278	18.27

Forward	60,196.08	29,314.18	21,109.01		159,676.25		146,659.42	13,016.83		2,296.66
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	60,196.08	29,314.18	21,109.01		159,676.25		146,659.42	3,016.83		2,206.66
Dec. 2, 1909	2,096.10			3,249.58		2,935.10				
43			274.02	328.92	3,578.50	315.21	3,250.31	328.19	12/9 1 265	34.18
Dec. 9, 1909	755.09			1,170.95		1,057.63				
44			244.18	293.88	1,464.83	281.63	1,339.26	125.57	12/11 1 263	13.05
Dec. 16, 1909	873.13			1,354.16		1,223.11				
45		392.11		549.57		510.32				
			483.04	579.84	2,483.57	555.68	2,289.11	194.46	12/18 1 256	19.95
Dec. 23, 1909	1,200.03			1,860.23		1,680.21				
46		497.12		696.64		646.88				
			446.01	535.26	3,092.13	512.96	2,840.05	252.08	12/27 1 247	25.49
Jany. 2, 1910	1,123.11			1,741.50		1,572.97				
47		468.06		655.62		608.79				
			532.19	639.54	3,036.66	612.89	2,794.65	242.01	1/8 1 235	24.00
Jany. 9, 1910	678.15			1,052.06		950.25				
48		174.10		244.30		226.85				
			261.07	313.62	1,609.98	300.55	1,477.65	132.33	1/13 1 230	13.00
Jany. 16, 1910	42.10			65.88		59.50				
2		83.08		116.76		108.42				
			347.16	417.36	600.00	399.97	567.89	32.11	1/20 1 223	3.12
Jany. 23, 1910	746.01			1,156.38		1,044.47				
3		311.12		436.24		405.08				
			419.19	503.94	2,096.56	482.94	1,932.49	164.07	1/27 1 216	15.74
Feby. 2, 1910	692.02			1,072.76		968.94				
4		84.06		118.02		109.59				
			308.19	370.74	1,561.52	355.29	1,433.82	127.70	2/8 1 204	12.01

\$68,405.02	31,327.03	24,428.06	179,200.00	164,584.65	14,615.35	2,367.20
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Charge of Court.

n. JAMES B. HOLLAND, J.:

GENTLEMEN OF THE JURY: In this case Henry E. Meeker, the petitioner, has instituted suit against the Lehigh Valley Railroad Company to recover the sum of \$10,813.60, with interest at six per cent. per annum from September 1, 1911 to July 15, 1912, amounting to \$567.05, making an aggregate of \$12,907.18, on which amount he claims interest from July 15, 1912, upon a Report of the Interstate Commerce Commission, on a petition presented by this plaintiff, alleging injury through unreasonable rates charged by the railroad company for the transportation of freight which the plaintiff, as a shipper, shipped over its road from the Wyoming Valley, Pennsylvania, to Perth Amboy, in New Jersey, during a period from April 13, 1908 to April 13, 1910.

The amount awarded as reparation by the Commission, as I have said, is \$12,907.18, and it is awarded on a petition presented, as I have said to you, by the plaintiff, alleging damages for an unreasonable charge for the transportation of coal over defendant's line. The Interstate Commerce Commission, under Section 14 of the Act, investigated the charge and found, as a conclusion, that there was an unreasonable rate charged, and directed the railroad company, as required by the Section of the Act, to make reparation to the plaintiff for this injury. That Report was filed by the Interstate Commerce Commission on June 8, 1911, and a supplemental Report was filed on May 7, 1911, awarding to the plaintiff the amount I have said and directing the railroad company to pay this amount. The defence in this case is that the railroad company has not paid that amount to the plaintiff. The plaintiff has offered in evidence these reports, showing that the Commission investigated and found that the plaintiff was damaged by reason of unreasonable rates and awarded this amount as reparation. These reports are in evidence, and they are made prima facie evidence of the fact of the Interstate Commerce Act. The railroad having failed to comply with the order of the Commission, in accordance with the provisions of the Interstate Commerce Act, the plaintiff instituted this suit in the United States Circuit Court, and he is now presenting his case and I instruct you that, in the absence of any countervailing evidence, either circumstantial or direct, the evidence here submitted is prima facie of the fact found in these reports, and sufficient upon which you can base a verdict in favor of the plaintiff if you take the report as evidence as directed by law, for the amount which is claimed by the plaintiff. That amount is a total of \$13,161.78.

The defendant asks me to charge you on a number of points submitted, which I refuse without reading to the jury.

Mr. PLATT: Will your Honor allow us certain exceptions? We object to the statement in your Honor's charge that this is a suit on the order of the Interstate Commerce Commission.

Exception noted as requested by direction of the Court.

Also to the statement that the amount is awarded by the Commission on a complaint for damages for excessive charges.

Exception noted as requested by direction of the Court.

Also to the statement that the Commission found that there was an unreasonable charge.

Exception noted as requested by direction of the Court.

Also to the statement that the Report in this case was filed on June 8, 1911.

Exception noted as requested by direction of the Court.

113 Also to the statement that the reports and order are made prima facie evidence of the facts by the Interstate Commerce law.

Exception noted as requested by direction of the Court.

Also to the statement, "I instruct you, in the absence of other countervailing evidence, either substantial or direct; that the evidence submitted is prima facie evidence of the facts found in these reports, and sufficient to base a verdict upon."

Exception noted as requested by direction of the Court.

Also to the refusal of the Court to charge as requested in defendant's points for Charge.

Defendant's points for Charge, which were refused by the Court without reading, are as follows:

"Upon the whole case, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point an exception is noted for defendant by direction of the Court.

"The order and Report on which the petitioner relies, both for the establishment of his case in this Court and for the jurisdiction of this Court in this action, are invalid, unconstitutional and void, in that they deprive the defendant of due process of law, it not being within the power of Congress to provide by Legislative enactment that the Interstate Commerce Commission can make findings upon which there may be claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages, the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and, therefore, the verdict must be for the defendant."

114 To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and findings of the Commission were invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury. The order and findings assume to take from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case; and further, in effect impose upon this Court, as evidence in this case, that which is not legal evidence, and further, to impose upon this Court, as findings of the Commission, conclusions not based on findings, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the fore-

going point an exception is noted for defendant by direction of the Court.

"The order and findings upon which the plaintiff's case rests are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation at that time, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated. The power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore, the verdict must be for the defendant."

115 To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The award made in the reparation order is not based on the findings of fact required by the Act, as the Act requires that, in case damages are awarded, such reports shall include the findings of fact on which the award is made, and the Report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff were unreasonable, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"It appears on the face of the order and in the Report that the total amount awarded by the Interstate Commerce Commission was the sum of several amounts claimed on several separate shipments of coal between April 13, 1908 and April 13, 1910, and that each such shipment was the basis of a separate cause of action. There was no finding by the Commission as to the several amounts due upon the several causes of action, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no competent evidence in this case, either by way of findings or statements, or evidence of any kind, that the rates charged by the defendant railroad for transporting coal to Perth Amboy, from April 13, 1908 to April 13, 1910, were unreasonable, unjust or excessive, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for the defendant by direction of the Court.

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"There is no competent evidence either by way of findings or statements, or any other evidence in this case, that the petitioner was in any way damaged by the alleged imposition of unreasonable rates on the part of the railroad, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

There is no competent evidence, either by way of findings or statements, or any other evidence in this case, that the reduced rates on which the amount of the alleged reparation is computed, were at any time between April 13, 1908 and April 13, 1910, reasonable or duly compensatory, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and findings do not show that petitioner has been injured; on the contrary, they show that the award of reparation to him is a discrimination in his favor against other shippers and a judgment in his favor would constitute such discrimination; therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Inasmuch as it appears that petitioner was charged and paid the correct tariff rates, according to tariffs duly filed pursuant to Section 6 of Act, therefore, petitioner cannot recover back any part of 117 the freights so paid to the railroad, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and reports on which petitioner rests his case are invalid and void, because in the proceedings before the Commission, the Commission failed to give to the defendant railroad the hearing provided for in the Interstate Commerce Commission Act, which said hearing the Act provides, shall be a condition precedent to the making of any valid order or findings, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"It appears on the face of the Report that the Commission drew conclusions from the evidence before it, which conclusions were controlling in the proceedings of the Commission, and were, as a matter of law, incorrect and improper conclusions; said conclusions being the conclusion as to reasonableness of rates."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

Mr. Warren, of counsel for the defendant, requested the learned Judge to direct the stenographer to reduce the notes of testimony and Charge to typewriting, and file the same of record in the cause, which request was granted, and the stenographer so directed.

118 The Jury rendered a verdict in favor of the plaintiff for \$13,161.78.

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, to the action of the said Court, upon the objections made by them on behalf of the defendant and the admission of evidence offered on behalf of the plaintiff as aforesaid, and to the refusal of the defendant's points, and inasmuch as the said charge and opinion and the action of the Court as aforesaid so excepted to, do not appear upon the record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion and action of the said Court, and requested that the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereafter on the 19th day of December, 1912, the Court entered the following order:

"And now, to wit: this 19th day of December, 1912, it is ordered that defendant's motion for new trial be refused and that judgment be entered on the verdict; and the plaintiff having presented to the Court the record in this case before the Interstate Commerce Commission and upon oral statement in open court, in the presence of counsel for the defendants as to the services performed before the Interstate Commerce Commission and in this court;

"Further ordered that counsel for plaintiffs be allowed a counsel fee of \$2,500.00 for their services in the proceedings before the Interstate Commerce Commission, and a further fee of \$2,500.00 for their services in the proceedings in this Court;

119 "Further ordered that an exception be granted to the allowance by the Court of a fee to counsel for plaintiffs for services in the proceedings before the Interstate Commerce Commission, and also to the allowance of a fee for services in this court."

And thereafter, on motion of the plaintiff, judgment was entered in favor of the plaintiff and against the defendant in said cause, in the sum of \$13,161.78.

And thereupon the aforesaid Judge, at the request of the said counsel for the defendant, did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such cases made and provided, this 30th day of December, A. D. 1912.

JAMES B. HOLLAND. [SEAL.]

Order of Court.

Filed Dec. 19, 1912.

Before Holland, J.

And now, to wit: this 19th day of December, 1912, it is ordered that defendant's motion for a new trial be refused and judgment be entered on the verdict; and the plaintiff having presented to the Court the record in this case before the Interstate Commerce Commission and upon oral statement in open court in the presence of counsel for the defendant as to the services performed before the Interstate Commerce Commission and in this court.

Further ordered that counsel for plaintiff be allowed a counsel fee of Twenty-five Hundred (\$2,500) Dollars for their services in the proceedings before the Interstate Commerce Commission and 120 a further fee of Twenty-five Hundred (\$2,500) Dollars for their services in the proceedings in this court;

Further ordered that an exception be granted to the allowance by the Court of a fee to counsel for plaintiff for services in the proceedings before the Interstate Commerce Commission, and also to the allowance of a fee for services in this court.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Præcipe for Judgment.

Filed Dec. 19, 1912.

To the Clerk of the said Court:

Enter judgment in favor of plaintiff and against defendant in the sum of \$13,161.78 as per verdict of the jury.

WM. A. GLASGOW, JR.,
Attorney for Plaintiff.

Judgment.

Before Holland, J.

And now, this 19th day of December, 1912, in accordance with præcipe filed judgment is hereby entered on the verdict in the above case in favor of the plaintiff and against the defendant in the sum of \$13,161.78.

BY THE COURT.

Attest:

LEO A. LILLY,
Deputy Clerk.

121

Petition for Writ of Error.

Filed Dec. 30, 1912.

The Lehigh Valley Railroad Company, the defendant in the above entitled cause, being aggrieved by the final judgment made and entered by the Court in the above entitled cause on the 19th day of December, A. D. 1912, wherein it was adjudged that the plaintiff shall recover therein against the defendant the sum of \$13,161.78, with interest from the 12th day of November, 1912, and that counsel for the plaintiff shall receive from the defendant as counsel fee for their services before the Interstate Commerce Commission in the proceeding before that Commission entitled Henry E. Meeker against Lehigh Valley Railroad Company, No. No. 3235, the sum of \$2,500, and as further counsel fee for their services before the United States District Court for the Eastern District of Pennsylvania in this cause the sum of \$2,500, comes now by its attorneys, Everett Warren, Frank H. Platt, Edgar H. Boles and John G. Johnson, and petitions the Court for an order allowing the said defendant to prosecute a writ of error from the said judgment to the Circuit Court of Appeals of the United States for the Third Circuit, in accordance with the laws of the United States in such case made and provided; and also that an order be made fixing the amount of security which defendant shall furnish upon such writ of error, and that upon giving such security all further proceedings of this Court shall be stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray, etc.

EVERETT WARREN,

FRANK H. PLATT,

EDGAR H. BOLES,

JOHN G. JOHNSON,

Attorneys for Petitioner,

Per J. W. BAYARD.

December 27th, 1912.

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Order of Court.

Filed Dec. 30, 1912.

Before Holland, J.

And now, December 30th, 1912, on motion of Everett Warren, Frank H. Platt, Edgar H. Boles and John G. Johnson, attorneys for defendant,

It is ordered that a writ of error to the United States Circuit Court of Appeals for the Third Circuit from the final judgment heretofore filed and entered in the above entitled cause be and the same is hereby allowed and that a certified transcript of the record and of the proceedings herein be forthwith transmitted to the said Court.

And it is further ordered that the bond for damages and costs in said appeal be and the same is hereby fixed at \$26,323.56.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Assignments of Error.

Filed Dec. 30, 1912.

And now comes the defendant, Lehigh Valley Railroad Company, and files the following Assignments of Error, upon which it will rely upon its prosecution of the Writ of Error, in the above-entitled case:

1. The learned trial Judge erred in admitting in evidence the report of the Interstate Commerce Commission, dated June 8, 1911, in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, 123 etc., vs. Lehigh Valley Railroad Company, No. 1180. (Record p. 78.)

2. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated June 8, 1911, in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., vs. Lehigh Valley Railroad Company, No. 1180. (Record p. 78.)

3. The learned trial Judge erred in admitting in evidence the testimony of the witness Henry E. Meeker as follows:

"Q. I read you the following sentence from the report of the Commission of June 8, 1911: 'We are of opinion, and so find, that defendant's rates for the transportation of coal from the Wyoming Region to Perth Amboy of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal, are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat.' Have you made up a statement showing the amount of damage that you claim on the basis of the difference between the rates which the Commission found to be unreasonable and the rates which they prescribe as the reasonable rates on the several amounts of coal which you shipped from the period April 13, 1908, to April 13, 1910?

A. Yes.

Q. Will you please state the amount?

A. \$10,813.60." (Record, p. 81.)

4. The learned trial Judge erred in admitting in evidence the report of the Interstate Commerce Commission, dated May 7, 1912, in the proceeding pending before the Interstate Commerce Commission, entitled Henry E. Meeker against Lehigh Valley Railroad Company, No. 3235. (Record p. 88.)

5. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated May 7, 1912,

in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker against Lehigh Valley Railroad Company, No. 3235. (Record p. 88.)

6. The learned trial Judge erred in charging the jury, as follows:

"In this case, Henry E. Meeker, the petitioner, has instituted suit against the Lehigh Valley Railroad Company * * * upon a report of the Interstate Commerce Commission." (Record p. 111.)

7. The learned trial Judge erred in charging the jury as follows:

"The amount awarded as reparation by the Commission, as I have said, is \$12,907.18, and it is awarded on a petition presented, as I have said to you, by the plaintiff, alleging damages for an unreasonable charge for the transportation of coal over defendant's line." (Record p. 111.)

8. The learned trial Judge erred in charging the jury as follows:

"The Interstate Commerce Commission, under Section 14 of the Act, investigated the charge and found, as a conclusion, that there was an unreasonable rate charged." (Record, p. 111.)

9. The learned trial Judge erred in charging the jury as follows:

"That report was filed by the Interstate Commerce Commission on June 8, 1911." (Record p. 111.)

125 10. The learned trial Judge erred in charging the jury as follows:

"The plaintiff has offered in evidence these reports showing that the Commission investigated and found that the plaintiff was damaged by reason of unreasonable rates and awarded this amount of reparation." (Record p. 111.)

11. The learned trial Judge erred in charging the jury as follows:

"These reports are in evidence and they are made prima facie evidence of the fact by the Interstate Commerce Act." (Record p. 112.)

12. The learned trial Judge erred in charging the jury as follows:

"I instruct you that, in the absence of any countervailing evidence, either circumstantial or direct, the evidence here submitted is prima facie of the fact found in these Reports, and sufficient upon which you can base a verdict in favor of the plaintiff if you take the report as evidence as directed by law, for the amount which is claimed by the plaintiff. The amount is a total of \$13,161.78." (Record, p. 112.)

13. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"Upon the whole case the verdict must be for the defendant." (Record p. 113.)

14. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The order and report on which the petitioner relies, both for the establishment of his case in this court and for the jurisdiction of this court in this action, are invalid, unconstitutional and void, in that they deprive the defendant of due process of law, it not being within the power of Congress to provide by legis-

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lative enactment that the Interstate Commerce Commission can make findings upon which there may be claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and, therefore, the verdict must be for the defendant." (Record, p. 113.)

15. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The order and findings of the Commission were invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury. The order and findings assume to take from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rules of damages applicable to the case; and further, in effect impose upon this Court, as evidence in this case, that which is not legal evidence, and further, to impose upon this Court, as findings of the Commission, conclusions not based on findings, and, therefore, the verdict must be for the defendant." (Record p. 114.)

16. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The order and findings upon which the plaintiff's case rests are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation at that time, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated. The power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore, the verdict must be for the defendant." (Record p. 114.)

17. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The award made in the reparation order is not based on the facts of fact required by the Act, as the Act requires that, in awarding damages, such reports shall include the findings of fact on which the award is made, and the report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff were unreasonable, and, therefore, the verdict must be for the defendant." (Record p. 115.)

18. The learned trial Judge erred in refusing to charge the jury

as requested by the defendant in the points submitted by it, as follows:

"It appears on the face of the order and in the report that the total amount awarded by the Interstate Commerce Commission
128 was the sum of several amounts claimed on several separate shipments of coal between April 13, 1908, and April 13, 1910, and that each such shipment was the basis of a separate cause of action. There was no finding by the Commission as to the several amounts due upon the several causes of action, and, therefore, the verdict should be for the defendant." (Record p. 115.)

19. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence in this case, either by way of findings or statements, or evidence of any kind, that the rates charged by the defendant railroad for transporting coal to Perth Amboy, from April 13, 1908, to April 13, 1910, were unreasonable, unjust or excessive, and, therefore, the verdict should be for the defendant." (Record p. 115.)

20. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence, either by way of findings or statements, or any other evidence in this case, that the petitioner was in any way damaged by the alleged imposition of unreasonable rates on the part of the railroad, and, therefore, the verdict should be for the defendant." (Record p. 116.)

21. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence, either by way of findings or statements, or any other evidence in this case, that the re-
129 duced rates on which the amount of the alleged reparation is computed, were at any time between April 13, 1908, and April 13, 1910, reasonable or duly compensatory, and, therefore, the verdict should be for the defendant." (Record p. 116.)

22. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The order and findings do not show that petitioner has been injured; on the contrary, they show that the award of reparation to him is a discrimination in his favor against other shippers, and a judgment in his favor would constitute such discrimination; therefore, the verdict should be for the defendant." (Record p. 116.)

23. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"Inasmuch as it appears that petitioner was charged and paid the correct tariff rates, according to tariffs duly filed pursuant to Section 6 of the Act, therefore, petitioner cannot recover back any

part of the freights so paid to the railroad, and, therefore, the verdict should be for the defendant." (Record p. 116.)

24. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"The order and reports on which petitioner rests his case are invalid and void, because in the proceedings before the Commission, the Commission failed to give to the defendant railroad the hearing provided for in the Interstate Commerce Commission Act, 130 which said hearing the Act provides, shall be a condition precedent to the making of any valid order or findings, and, therefore, the verdict should be for the defendant." (Record p. 117.)

25. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"It appears on the face of the report that the Commission drew conclusions from the evidence before it, which conclusions were controlling in the proceedings of the Commission, and were, as a matter of law, incorrect and improper conclusions, said conclusions being the conclusions as to reasonableness of rates." (Record p. 117.)

26. The learned trial Judge erred in allowing counsel for the plaintiff a fee of \$2,500 for their services to the plaintiff in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker against Lehigh Valley Railroad Company, No. 3235. (Record p. 118.)

27. The learned trial Judge erred in allowing counsel for the plaintiff a fee of \$2,500 for their services to the plaintiff in this case. (Record p. 118.)

28. The learned trial Judge erred in entering judgment for the plaintiff upon the verdict. (Record p. 119.)

EVERETT WARREN,
FRANK H. PLATT,
EDGAR H. BOLES,
JOHN G. JOHNSON,

Attorneys for Defendant,

Per J. W. BAYARD.

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Bond Sur Writ of Error.

Filed Dec. 30, 1912.

Know all men by these presents, That we, Lehigh Valley Railroad Company, as principal, and United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto Henry E. Meeker, in the full and just sum of Twenty-six Thousand Three Hundred and Twenty-three Dollars and Fifty-six Cents, to be paid to the said Henry E. Meeker, his certain attorney, executors, administrators or assigns; to which payment well and truly to be made,

we bind ourselves, our heirs, executors and administrators; jointly and severally, by these presents. Sealed with our seals and dated this 28th day of December, in the year of our Lord one thousand nine hundred and twelve (1912).

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania, in a suit depending in said Court between the said Henry E. Meeker, plaintiff, and Lehigh Valley Railroad Company, defendant, to September sessions, 1912, No. 2148, on the 19th day of December, 1912, a judgment was rendered against the said defendant in the sum of Thirteen Thousand One Hundred and Sixty-one Dollars and Seventy-eight Cents (\$13,161.78) in favor of said plaintiff, and the said defendant, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the city of Philadelphia, within thirty days.

Now, the condition of the above obligation is such, That if the said Lehigh Valley Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

LEHIGH VALLEY RAILROAD COMPANY, [SEAL.]

By E. B. THOMAS, *President*. [SEAL.]

Attest: D. E. BAIRD, *Secretary*. [SEAL.]

UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]

By HENRY STRASS, [SEAL.]
Resident Vice-President.

Attest: S. LEO HARRIS,
Resident Secretary. [SEAL.]

Before Holland, J.

Approved:

By THE COURT.

Attest: GEORGE BRODBECK,
[SEAL.] *Deputy Clerk.*

133 *Stipulation for Record on Writ of Error.*

Filed Dec. 30, 1912.

And now, this 27th day of December, 1912, it is stipulated and agreed that the record sent to the Circuit Court of Appeals on the Writ of Error allowed in the above entitled cause shall contain:

1. Docket entries;

2. Petitioner's statement of claim, with the exhibits attached thereto;
 3. Defendant's plea;
 4. Bill of Exceptions; except the exhibits attached to plaintiff's statement of claim and printed with it;
 5. Petition for writ of error and order thereon;
 6. Specifications of Error;
 7. Bond sur writ of error; and
- No other papers.

WM. A. GLASGOW, JR.,
Attorney for Plaintiff.

EVERETT WARREN,
FRANK H. PLATT,
EDGAR H. BOLES,
JOHN G. JOHNSON,
Attorneys for Defendant,
Per J. W. BAYARD.

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Clerk's Certificate.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of Pleas and Proceedings in the case of Henry E. Meeker vs. Lehigh Valley Railroad Company, No. 2148, September Session, 1912, as per præcipe filed, a copy of which is hereto annexed, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 30th day of January, in the year of our Lord one thousand nine hundred and thirteen, and in the one hundred and thirty-seventh year of the Independence of the United States.

[SEAL.]

WILLIAM W. CRAIG,
Clerk District Court U. S.

- 135 *Certified Copy of Proceedings in Circuit Court of Appeals in
No. 1720.*

[Seal United States Circuit Court of Appeals, Third Circuit.]

- 136 In the United States Circuit Court of Appeals for the Third
Circuit, March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

And afterwards, to wit, on the second and third days of April, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof;

And afterwards, to wit, on the twenty seventh day of August, 1913, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

- 137 In the United States Circuit Court of Appeals for the Third
Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern
District of Pennsylvania.

Before Gray, Buffington, and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

On September 3, 1912, Henry E. Meeker, surviving partner of the firm of Meeker & Company, defendant in error (hereinafter

called the plaintiff), instituted in the court below, under the provisions of section 16 of the Act to Regulate Commerce, a suit against the Lehigh Valley Railroad Company, plaintiff in error (hereinafter called the defendant), to recover damages alleged to have been incurred by reason of certain acts and practices of the defendant, in violation of said act, and therefore the subject of complaint by the said plaintiff before the Interstate Commerce Commission.

To the judgment obtained by the plaintiff against the defendant, this writ of error has been sued out by the latter.

In his petition in the court below, "setting forth briefly the causes for which he claims damages," plaintiff charges that the defendant company, as a common carrier, subject to the provisions of the Interstate Commerce Act, from November 1, 1900, to August 1, 1901, discriminated against his firm, in that it demanded and received from Meeker & Company greater compensation for services rendered in the transportation of anthracite coal, from the Wyoming region in Pennsylvania, to Perth Amboy, in New Jersey, than it demanded or received from another shipper for "a like and contemporaneous service in the transportation" of anthracite coal between the same points, in violation of section 2 of the Act to Regulate Commerce; and further charges that from August 1, 1901, to July 17, 1907, the defendant company demanded and received from plaintiff's firm unjust and unreasonable rates for the transportation of anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy, New Jersey, in violation of said act.

In support of this charge, it is alleged in the petition, as follows: That defendant is a common carrier engaged in interstate railroad transportation between points in the states of Pennsylvania, New Jersey and New York, and is largely engaged in transporting anthracite coal for plaintiff and other shippers over its lines, from collieries in the Wyoming coal region of Pennsylvania, to Perth Amboy, in the state of New Jersey; that one of said shippers other than plaintiff is the Lehigh Valley Coal Company, a corporation of the state of Pennsylvania, engaged in the business of mining and buying anthracite coal in said Wyoming region.

Plaintiff alleges that from November 1, 1900, to August 1, 1901, the defendant company, intending to unjustly and unreasonably discriminate in favor of, and to prefer, the Lehigh Valley Coal Company to the plaintiff and other independent shippers, unlawfully charged the plaintiff with excessive and discriminatory rates on 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, shipped between the said Wyoming coal region and Perth Amboy, New Jersey, the total charges on such coal amounting to \$129,989.18, whereas, had the plaintiff been given the benefit of the rates charged by defendant for similar shipments of the said Lehigh Valley Coal Company, the total charge upon plaintiff's said shipments would have been \$11,909.33 less than the sum exacted as above during the period aforesaid, which sum, with interest thereon from August 1, 1901, was awarded by the Interstate Commerce Commis-

sion in favor of the plaintiff, in their supplemental report dated May 7, 1912, as also in their orders supplemental thereto, issued June 8 and 15, 1912, attached to said petition and marked Exhibits "A" and "B," respectively.

Plaintiff further alleges that from August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner, over its said line of road from the Wyoming coal region, aforesaid, to Perth Amboy, at tide water in New Jersey, the following unreasonable and excessive charges upon all shipments of anthracite coal, to wit:

140 \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 per ton for coal smaller than buckwheat coal. That from August 1, 1901, to July 1, 1907, these shipments amounted to 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and that the charges paid thereon amounted to \$685,375.27, at rates exceeding \$1.40 per gross ton in prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat coal, the rates fixed by the Interstate Commerce Commission as proper and reasonable, the amount of such excess being \$58,236.45. paid by plaintiff to the defendant. That said payments were made under protest that the same were unreasonable and excessive.

The petition then recites that on July 17, 1907, plaintiff filed with the Interstate Commerce Commission a complaint, setting forth the aforesaid unreasonable and discriminatory practices and charges of defendant, to the prejudice of the plaintiff and in violation of the Act to Regulate Commerce, and praying for a hearing upon the allegations set forth in said complaint, and that the commission make an order, requiring the defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line, from the Wyoming region to tidewater at Perth Amboy, and awarding complainants reparation in damages in such amount as they might have suffered loss by reason of said improper practices and charges. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the complaint regularly heard and argued by all the parties thereto, and submitted. A report was duly filed by the said commission on June 8, 1911, in Docket No. 1180, a copy of which report, with the conclusions and orders of the commission, is attached to plaintiff's petition as "Exhibit C."

141 By this report the Interstate Commerce Commission held that the charges by the defendant company to the plaintiff, between November 1, 1900, and August 1, 1901, were discriminatory, and therefore unlawful, and also that the charges of defendant company, between August 1, 1901, and July 1, 1907, were unreasonable, and the same were ordered to be discontinued, and that reasonable and proper charges for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid, should thereafter be \$1.40 per gross ton on prepared sizes, instead of \$1.55, the rate charged, and \$1.30 on pea coal, instead of \$1.40, the rate charged, and \$1.15 on buckwheat coal, instead of \$1.20, the rate charged, and the commission held "that

reparation should be awarded upon the basis of the rates herein found to be reasonable, upon all shipments of coal by complainants from the Wyoming region to Perth Amboy, since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants."

Plaintiff's petition further recites that a hearing was had upon the question of reparation, and that a supplemental report was filed by said commission May 7, 1912. In this report, attached to the petition and marked "Exhibit A," the commission state "that the original report in No. 1180 disposed of all the questions at issue, except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature. A further hearing has been held, and complainant has presented exhibits, showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct."

They then refer to their finding in the original report, that the rates exacted by defendant from November 1, 1900, to August 1, 1901, were unjustly discriminatory and in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and the defendant, and to the further finding in said original report, that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat.

They then proceed to say that on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, they now find that, during the period from November 1, 1900, to August 1, 1901, in regard to the charges exacted from plaintiff and found to have been unjustly discriminatory, that complainant was entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. And they further find, in regard to the rates exacted for coal shipped by plaintiff from August 1, 1901, to July 7, 1907, which were found unreasonable in the original report, that plaintiff is "entitled to an additional award of reparation in the sum of \$58,236.45 with interest amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45, from September 1, 1911."

Following said supplemental report, and on the same day, to wit, May 7, 1912, a so-called supplemental order was entered, which, as amended in an unimportant particular May 15, 1912, read as follows:

143 "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved hav-

ing been had, and the commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent. per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region, in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the commission.

"It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2. together with interest at the rate of 6 per cent. per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania, 144 to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unreasonable, as more fully and at large appears in and by said report of the commission."

The petition then avers that a true copy of this order of the commission was duly served upon the defendant, and demand made for payment of the sum claimed in the petition, and as set forth in the aforesaid orders of the commission and attached to the petition as Exhibits "A" and "B," but the defendant had failed and refused to pay the said sums, or any part thereof. "Wherefore," it is alleged, "petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce." (The theory of the petition thus appears to be that this is a proceeding to enforce the order of reparation made by the commission, and not a suit for the recovery of such damages as plaintiff has actually incurred by reason of the alleged unlawful acts of defendant, as found by the commission.) The court is then prayed to enter a rule upon said defendant to file a plea, answer, or demurrer to the petition within thirty days from the date of serving a copy of the same, and to fix a time and place for the trial of the cause under the provisions of the Act to Regulate Commerce.

The defendant accordingly filed, October 5, 1912, its plea of the

general issue, the bar of the statutes of limitation applicable to plaintiff's claim, and for a further plea averred that the Interstate Commerce Commission had no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce, and that there was before the commission no substantial evidence to sustain its findings and order.

At the trial, the plaintiff put in evidence the report of the commission, dated June 8, 1911 (see Record, pp. 22-73), and the
145 order thereon of the same date, requiring the defendant to abstain from charging or receiving its present rates for the transportation of coal so found to be unreasonable, and requiring defendant for a period of two years thereafter to maintain the rates found in said report to be reasonable. Also, the supplemental report of the commission, dated May 7, 1912, finding the reparation or damages to which the plaintiff was entitled, and the supplemental order of that date, amended by that of June 15, as hereinbefore set out, requiring the defendant to pay to plaintiff, on or before the first day of August, 1912, the sums found due as and for reparation in said supplemental report.

Save the testimony of the plaintiff (Meeker), bearing upon the charge of discrimination as to freight rates between November 1, 1900, and August 1, 1901, no evidence, other than these four papers, was offered by plaintiff at the trial. The defendant offered no testimony, except that of Mr. George W. Field, one of its counsel, who attended the hearing before the Interstate Commerce Commission and made certain calculations from Exhibits "A" and "B," offered in evidence by defendant, dividing up the shipments therein set out between different dates, to which the different statutes of limitation might apply. Plaintiff's contention was and is, that these four papers, in the absence of any evidence on the part of the defendant, made out a prima facie case in his favor and entitled him to a recovery, as damages, of the amounts awarded by the commission.

This was the view taken by the learned judge of the court below, in submitting the case to the jury, and a verdict was accordingly rendered in favor of the plaintiff for the aggregate sums awarded by the commission, as reparation, which, with interest thereon,

amounted to \$109,280.17. To the judgment thereon, this
146 writ of error is sued out by the defendant. Certain of the assignments challenge the constitutionality of section 16 of the Act to Regulate Commerce, on the ground that its provision, that the findings and order of the commission shall be prima facie evidence of the facts therein stated, is unconstitutional, in that it confers judicial power upon an administrative commission, deprives the defendant of its property without due process of law, and denies to it its right of trial by jury; and also, on the ground that the provision of said section, conferring upon the commission authority to determine and award damages to any party complaining of the violation of the act by a common carrier and to direct such carrier to pay to the complainant before a day named the sum so awarded, and declaring that, on a trial of a suit to recover such damages, the facts stated in the findings and order of the commission shall be

prima facie evidence of the facts therein stated, is not a proper exercise of the powers given to Congress to regulate commerce. The latter point was raised before this court in the case of *Western New York & P. R. R. Co. vs. Penn Refining Co.*, 70 C. C. A. 23. We there said:

"The constitutionality of the provisions making findings of fact prima facie evidence before a jury, has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guaranty relative to trial by jury in the courts of the United States, does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision, counsel for the plaintiff in error does not attempt a reargument of the question before this court. The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute. The questions

147 raised by the assignments of error which are most material, relate to the submission of the reports and orders of the Interstate Commerce Commission, and to how far and in what respect the same are to be taken as prima facie evidence of facts stated by them. Also, the question whether the facts of which such reports and orders are the prima facie evidence, are sufficient, in the absence of countervailing testimony by the defendant, to maintain the plaintiff's suit and claim for damages.

This court has already, in a decision at this term, in the case of *Lehigh Valley Railroad Co. et al. vs. J. Mitchell Clark, et al.*, discussed at some length the history of the legislation embodied in the Act to Regulate Commerce, and its amendments. As we there pointed out, section 14 of the original act made it the duty of the commission to make a report in writing, which should include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 16 provided for the refusal or neglect "to obey any lawful order or requirement of the commission, by authorizing the commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States, sitting in equity, and empower such court, as a court of equity, to hear and determine the matter, etc. And on such hearing, the report of said commission shall be prima facie evidence of the matters therein stated. And it was provided that if it be made to appear to the court "that the lawful order or requirement of said commission,

drawn in question, has been violated or disobeyed," the court 148 may issue "a writ of injunction, or other proper process, mandatory or otherwise, to restrain the common carrier from further violation or disobedience of such order."

From the fact that it was to a court of equity alone that resort was to be had for the enforcement of an order of the commission, it

was apparent that it was only to such ministerial orders of the commission as could be enforced by a court of equity, that the act in this respect could apply, and that a recommendation or an award of damages by the commission was not such an order or requirement as could be thus enforced without a violation of the seventh amendment to the Constitution, in regard to jury trials. This consideration suggested the Act of March 2, 1889, amending section 16 of the original act by adding thereto the following:

"If the matters involved in such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice, etc., * * * it shall be lawful for any company or person interested * * * to apply in a summary way, by petition, to the Circuit Court of the United States, sitting as a court of law, * * * alleging such violation or disobedience as the case may be."

Then, after providing for a jury trial, the amendment concludes

"At the trial, the findings of fact of said commission, as set forth in its report, shall be prima facie evidence of the matters therein stated."

The distinction thus clearly made between reparation and non-reparation cases, is made still more clear in the so-called "Hepburn Act of 1906, in which section 14 was amended so as to read, as follows:

149 "That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

This distinction was still further emphasized by so amending section 16 as to provide that, where, after hearing on a complaint, the commission should determine that complainant is entitled to an award of damages, it

"shall make an order, directing the carrier to pay to the complainant the sum to which he is entitled, on or before the day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file in the Circuit Court of the United States for the district in which he resides, * * * a petition, setting forth, briefly, the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that, on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated."

After other provisions, the section, as amended, further provides (the italics being ours):

"If any carrier fails or neglects to obey any order of the commission, *other than for the payment of money*, and while the same is

in effect, any party injured thereby, or the commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, * * * for an enforcement of such order. Such application shall be by petition, which shall

150 state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise."

Thus, the inherent and obvious distinction between reparation and non-reparation cases is clearly recognized by Congress. It could hardly be otherwise than that such recognition should be made. The great purposes of the act are largely accomplished by the administrative control given to the Commerce Commission over all carriers, as to Interstate Commerce, and that administrative control is made efficient by the peculiar jurisdiction of a court of equity, to which the commission or a party interested may apply for the enforcement of its orders. In such cases, the whole record of the investigation by the commission is before the court, and the only matter to be determined is that the order made by the commission is a lawful order; that is, made within the scope of the authority conferred by Congress, and upon a full hearing of the parties, with the opportunity accorded of adducing testimony and having it considered. (I. C. C. et al. vs. Louisville & Nashville R. R. Co., lately decided by the Supreme Court of the United States and not yet reported.)

When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the commission as an administrative body, and of enforcing its 151 proper control over Interstate Commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a quasi public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the kind are determined, by a jury trial at common law.

The right to a jury trial having thus been preserved by the provisions of the act above referred to, under them "the parties are entitled," as said by us in *Western New York & P. R. R. Co. vs. Penn Refining Co.* (supra) "to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied

with the usual safeguards, furnished by a proper application of principles of evidence and the proper submission of the case to jury." This right of trial by jury is not granted, as of grace, by act, but is a constitutional right of which the defendant cannot be deprived. The consistency and harmony of the reparation provisions as authorized by the act, with the administrative features thereof, are, however, as pointed out by the Supreme Court in *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, maintained by Congress having made, in the exercise of its legislative power, to the law of evidence, the "findings and order of the commission prima facie evidence of the facts therein stated." In all other respects, a suit under the act shall proceed "like all other civil suits for damages." We cannot give less than full meaning and effect to this language. What may be the facts, or classes of facts,

152 which this provision of the act applies, must be the important question in this, as in other cases, for the determination by the court. As under the decision in the *Abilene* case, the literal language of the act, in allowing a complainant as to all matters bringing an independent common law action for damages, cannot be reconciled with the general scope of the act, or with other particular provisions thereof, a suit for damages must in all cases calling for the exercise of the discretion of the administrative and rate-regulating body, be founded upon a previous application to and investigation by the Commerce Commission, and instituted with reference to "rights recognized in or to duties imposed by the act." We think therefore, it clearly follows from the premises:

(1) That the finding of the commission as to the reasonableness or otherwise, of the rate charged by the carrier in Interstate Commerce, is an administrative function properly and constitutionally delegated by the legislative power to the commission, and is, if fully made, conclusive upon a court of equity, in which it is sought to enforce an order founded upon the same. In the language of Mr. Justice Lamar, in *I. C. C. vs. Union Pac. R. R. Co.*, 222 U. S. 541, "there was, then, under the statute nothing for the complainant to do, except to comply with the order." The lawfulness of a finding is subject to judicial inquiry only in the respects above referred to.

(2) Assuming, but not deciding, that such finding is not only an administrative conclusion by the commission, which can be enforced as such by a court of equity, but also a finding of fact having evidential value in a suit for damages, it is only prima facie evidence of such fact, and not conclusive, as it would be in a suit in equity to enforce the fixing of a reasonable rate.

153 (3) The finding by the commission that a given rate is unreasonable, while pertinent to the issue, is not necessarily decisive of the question of liability in such a case as the present, either prima facie or otherwise. No argument is needed to show that the liability of the defendant, in damages, cannot be established by the mere finding or award of the commission in regard to the rate. If it could be, of course all distinction between reparation and damages cases, so carefully made in the statute, would be nugatory.

and the value of the common law trial, secured by the seventh amendment, be destroyed.

The pertinency and evidential weight and value of the facts, as to which the findings and order are *prima facie* evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a *prima facie* case for the plaintiff. The importance of the exceptional privilege thus conferred upon the plaintiff, of not being required to prove, in the first instance, the facts found by the commission, makes it the more necessary that the court should point out to the jury what are and what are not such findings. The imperative command of section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the commission, with reference to their proposed use in a jury trial, and evidently with this understanding, the original rule of the commission was made, that "upon the final submission of the case to the commission, either party may submit proposed findings of fact for the consideration of the commission, which findings must embrace only the material facts of the case supposed to be established by the testimony."

No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the commission, what were properly to be considered such findings. We can only reiterate what was said by us in the *Penn Refining Company case* (*supra*):

"While not expressing the opinion that findings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be disregarded. Unless this course be pursued, the parties are deprived, at least in part, of the benefits and safeguards intended to be secured to them under the constitutional guaranty of a trial by jury."

It will be remembered that the only evidence adduced by the plaintiff in support of his claim for damages at the trial, consisted of the four documents to which we have above referred, viz:

(1) The original report of the commission, dated June 8, 1911, occupies fifty printed pages of the record. In this report, the commission find that the complainants have sustained the allegation of unjust discrimination under the second section of the act, and that reparation, with interest from August 1, 1901, will be awarded on this account. At the close of their report, they find, as follows:

"After careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits, respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy
* * * are unreasonable so far as they exceed"

155 a certain amount. (This finding, as defendant contends, is not a finding that the rates in effect from August 1, 1901, to

July 17, 1907, were unreasonable, but that the then present rates, as they existed at the date of the report, were unreasonable.) The opinion is then expressed that reparation should be awarded upon the basis of the rates found in said report to be reasonable.

(2) This report is followed by an order of the same date, commanding the defendant "to desist, on or before the 15th day of August, 1911, and for a period of two years thereafter, from charging or demanding its present rates, and that defendant be required to establish, on or before said date, and maintain for a period of two years thereafter, rates not in excess" of the rates therein specified.

(3) A supplemental report, made by the commission, May 7, 1912, which states that the original report disposed of all the questions at issue, except the claim for reparation, and that the case was held open for further information regarding that feature. It then states that a further hearing had been held and complainant had presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on the amount of such shipments. They then say that in their original report they had found that the rates charged complainant for transportation of coal during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory to an extent named, and that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, so far as they exceeded rates established as reasonable by the commission. This latter reference to the original report is, as claimed by the defendant, inaccurate. They then say that, on the basis of

156 their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation (which is nowhere set out), they find, first, the number of tons of the various sizes of coal shipped by complainant over defendant's road from November 1, 1900, to August 1, 1901, and the amount of the charges thereon, and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid had he had the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company. Second, they find the number of tons shipped by plaintiff over defendant's road, from August 1, 1901, to July 7, 1907, and the charges paid thereon, "at the rates found to have been unreasonable;" and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid at the rates found reasonable.

(4) By the supplemental order issued on the same day, to wit, May 7, 1912, and amended June 15, 1912, which we have heretofore quoted in extenso, the defendant is required to pay, as reparation, to the plaintiff the amount found to have been unjustly discriminatory, and also the amount charged by said defendant over and above the amounts found to be reasonable by the commission.

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14, that "in case damages are awarded, such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the

award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report, 157 there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the commission, all of which were irrelevant to an award of actual pecuniary damage.

The assignments of error are numerous, but, for the purposes of this case, we may confine our attention to those which are founded upon the admission by the court, over the objection of the defendant, of these four papers, as evidence before the jury, without discrimination on the part of the court as to the evidential value of the opinions, statements, arguments and conclusions contained therein; to those upon the failure of the court to clearly separate and distinguish, for the benefit of the jury, the findings of fact from the incompetent matter contained in such reports, and to direct that the latter be wholly disregarded; and to those founded upon the portions of the charge of the court, in which the jury are in effect told that the award of damages made by the commission against the defendant, in the orders of reparation pursuant to its report, was, in the absence of controlling testimony on the part of the defendant, binding upon the jury.

The reparation report of May 7, 1912, contains no findings of fact, but merely refers to the original report of June 8, 1911, "as disposing of all the questions at issue, except the claim for reparation," and is silent as to the information and evidence that may have been adduced before it relevant to that claim. The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff. 158 It is quite conceivable that, though, in the performance of its administrative function, the commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it. As said by Mr. Commissioner Clements in a public address:

"It often happens, in the attempt at reparation for wrongs accomplished, that the party most injuriously affected has no standing in law to claim reparation, for the reason that he was not the shipper and had no dealing with the carrier—he may have been the producer, consumer, or the dealer, and yet the price at which he sold or bought may have been so affected that ultimately he had to bear the burden of the increased rate, although it was paid directly, in the first instance, by the shipper."

The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself,

by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.

The contention of the plaintiff, sanctioned by the court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a *prima facie* case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the statute, to recover damages, in which the causes for which

159 plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages.

The learned counsel for the plaintiff has not pointed out in his brief, nor claimed in his oral argument that there are any findings of fact upon which the award of damages was made by the commission, except its conclusion as to the existence of a discriminatory charge between 1900 and 1901, and of an unreasonable charge between 1901 and 1907, and those findings of fact and circumstances tending to establish the same. A careful reading of the fifty pages of this report does not disclose any specific findings of fact bearing on the award of reparation, other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it, on the charges of discrimination and of unreasonableness.

Granting, however, that these papers, including this long report in which the findings of fact alone are to be looked for, were admissible, as has been already indicated, it was clearly the duty of the court below to point out such portions of the voluminous record as alone should be considered findings of fact, within the meaning of section 16 of the act. We think in this respect the court has failed to assist the jury in the proper conduct of the case, to the detriment of the defendant. It can hardly be denied that such instructions were not only due from the court to the jury, but that without them, these papers, including this voluminous report of the commission, which in itself constituted a fair sized book, should not have been admitted. The record discloses the fact that, when this report of June 8, 1911, was offered in evidence, it was objected to by the defendant, on the ground that it contained no findings of fact, as required by the statute, or which are material or relevant in a reparation suit. Counsel for plaintiff said in reply:

160 "There are certain findings of the commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the commission may make."

Upon further objection by counsel for defendant, on the ground that

"The report contained many statements purporting to be statements of evidence in the hearing before the Interstate Commerce Commission, arguments, opinions, and conclusions, which the statute does not purport to make admissible as *prima facie* evidence,"

counsel for plaintiff said in reply:

"I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, statements of an historical character, which I think under the cases, the court should control in submitting the case to the jury, and direct their attention to the facts found in the report."

The COURT: "Then your idea is simply to offer the report in evidence, for the purpose of proving that there was an order made, and all relevant material in support of that evidence?"

COUNSEL FOR PLAINTIFF: "Yes, sir."

The COURT: "The court will, of course, indicate to the jury what of the report is relevant."

161 After this very significant colloquy the report was admitted in evidence, and afterwards, at the close of the testimony, the record states that counsel for the defendant "read to the jury what he stated to be material portions of said exhibits." It is not stated, however, in the record, what portions were so read; and we look in vain for any directions by the court to the jury in regard to this important matter.

The following extracts from the charge indicate the theory upon which the court below submitted the case to the jury, and the attitude of the court towards these reports and orders of the commission:

"It is objected here, gentlemen of the jury, that these reports made by the commission, upon which this suit is based, are not in accordance with the requirements of this act and, therefore, you should find for the defendant. But I instruct you, gentlemen of the jury, that they are, in the judgment of the court, in accordance with the requirements of this section. They state the conclusions as required by the act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit."

* * * * *

"In the presentation of this claim to the court and the jury, the Act of Congress *gives the report* a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a jury, for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution.

162 But in that proceeding, the suit is *on the report* of the finding of the Interstate Commerce Commission, and their finding if made *prima facie* evidence of the correctness of the amount

the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, *and that makes its prima facie case of its right to claim.*" (The italics are ours.)

There is no attempt here, or elsewhere in the charge, to separate from the mass of statements in the report what might be considered findings of fact, or to instruct the jury that the statute, in making such findings prima facie evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the court gave the jury to understand that the report and findings of the commission as to unreasonableness, and the award of damages made thereon, were prima facie evidence of the plaintiff's case and of the liability of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the commission need not be proved in the suit for damages, but that such findings or order shall be prima facie evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order prima facie evidence of certain
163 facts, but it does not make, or attempt to make, such facts prima facie evidence of anything.

Since the hearing and determination of this case, as also of Lehigh Valley Railroad Co. vs. J. Mitchell Clark, et al., the Supreme Court has promulgated an opinion and decision in Pennsylvania Railroad Co. vs. International Coal Mining Company. This decision bears directly upon some of the fundamental questions involved in the case now under consideration, as it did in those involved in the Clark case, above referred to. On the vital point, whether in this suit, "like other civil suits for damage," actual damage must be proved, we again quote the language of Mr. Justice Lamar:

"There were many provisions of the statute for imprisonment and fines. On the civil side, the act provided for compensation—not punishment. Though the act had been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons vs. Railway*, 167 U. S. 460, construing this section (8), 'before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

After referring to quite a number of cases relied upon by plaintiff, Mr. Justice Lamar says they "do not support the proposition, that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

It hardly needs to be pointed out, as we did in the Clark case, that the ratio decidendi of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also
164 distinctly decides that, in the absence of proof of actual damage to that extent, the amount of the rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. Nor more in this case can the difference between what is found by the commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered. As pecuniary damages are neither alleged in the pleadings nor proved in the trial, the plaintiff made out no case upon which recovery of damages could be had.

For the reasons above stated, we think the judgment below should be reversed, with directions for a venire de novo.

There was a second complaint made to the Interstate Commerce Commission by defendant (Meeker), in his own name, dated April 13, 1910, pending the proceeding in his first complaint filed July 17, 1907. In the former complaint, as we have seen, the commission were dealing with the question of the unreasonableness of the rates on anthracite coal from the Wyoming region to Perth Amboy, between August 1, 1901, and July 17, 1907, whereas the second complaint dealt with the same charges or rates between July 17, 1907, the date of the filing of the first complaint, and April 13, 1910. The supplemental report of the commission, dated May 7, 1912, was a blanket report and covered both complaints. As to the later case, the report, after dealing with the former, said:

"With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the commission in No. 1180. The latter case covered the period from November 1st,

1900, to July 17th, 1907, while the instant case is designed
165 to secure reparation upon shipments which moved between July 17th, 1907, and April 13th, 1910. The petition in the

present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report. * * *

The former case was filed with the commission within one year from the passage of the law of June 29th, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is therefore subject to the two year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case, must be denied.

"On basis of our decision in No. 1180, upon consideration of the

evidence submitted at the hearing of the present case regarding the amount of reparation due complainant,"

the commission find that the rates exacted by defendant during the two years prior to the filing of his last complaint, were unreasonable to the same extent as found in the report as to the former period from August 1, 1901, to July 17, 1907. The report in this latter case does not purport to include the statements and findings of the original report, or of the supplemental report in regard to the former case. It merely makes a finding of unreasonableness on the basis of their decision in No. 1180. How far it is competent for the commission to proceed upon findings and evidence in a former and distinct case, by merely referring to the same, need not now be decided. The suits in the court below, as to both cases, were tried and submitted to the jury together, upon the same instructions as to

the prima facie character of the report and the award.
166 Therefore, what has been heretofore said in regard to the former case, is applicable to the latter, and need not be repeated.

The judgment, therefore, in the second case must also be reversed, with directions for a venire de novo.

The second paragraph of section 16 of the act concludes as follows:

"All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court, or state court, within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

The manifest intention of Congress here, as in all statutes of limitations, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with

those whose claims having accrued after the passage
167 of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it did not mean to preserve

the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905.

(Received and filed August 27, 1913. Saunders Lewis, Jr., Clerk.)

168 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1720 (List No. 28).

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed with costs, with directions for a venire de novo.

(Signed)

GEORGE GRAY,

Circuit Judge.

Philadelphia, August 29, 1913.

Endorsed: No. 1720. Order Reversing Judgment Received & Filed Aug. 29, 1913. Saunders Lewis, Jr., Clerk.

169 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

And afterwards, to wit, on the twenty-third day of September, 1913, a petition for rehearing was filed, on behalf of Defendant in Error, upon consideration whereof the Court made the following order:

- 170 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

Nos. 1720 and 1721.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,
vs.

HENRY E. MEEKER, Defendant in Error.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,
vs.

MEEKER & COMPANY, Defendant in Error.

Upon consideration of the petition for re-hearing filed in the above-entitled causes, it is now hereby ordered that the same be granted and that the cases be added to the present October Term List for re-argument.

(Signed)

GEORGE GRAY,
Circuit Judge.

Philadelphia, October 15, 1913.

Endorsed: Nos. 1720 and 1721. Order Granting Re-hearing and directing cases placed on list for re-argument. Received & Filed Oct. 15, 1913. Saunders Lewis, Jr., Clerk.

- 171 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,
vs.

HENRY E. MEEKER, Defendant in Error.

And afterwards, to wit, on the third day of December, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof;

And afterwards, to wit, on the nineteenth day of February, 1914, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

172 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business Under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

Opinion of the Court by Gray, Circuit Judge.

173 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business Under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

On September 3, 1912, Henry E. Meeker, surviving partner of the firm of Meeker & Company, defendant in error (hereinafter called the plaintiff), instituted in the court below, under the pro-

visions of section 16 of the Act to Regulate Commerce, a su
 174 against the Lehigh Valley Railroad Company, plaintiff in
 error (hereinafter called the defendant), to recover damages
 alleged to have been incurred by reason of certain acts and practices
 of the defendant, in violation of said act, and therefore the subject
 of complaint by the said plaintiff before the Interstate Commerce
 Commission.

To the judgment obtained by the plaintiff against the defendant
 this writ of error has been sued out by the latter.

In his petition in the court below, "setting forth briefly the cause
 for which he claims damages," plaintiff charges that the defendant
 company, as a common carrier, subject to the provisions of the In-
 terstate Commerce Act, from November 1, 1900, to August 1, 1901,
 discriminated against his firm, in that it demanded and received
 from Meeker & Company greater compensation for services rendered
 in the transportation of anthracite coal, from the Wyoming region
 in Pennsylvania, to Perth Amboy, in New Jersey, than it demanded
 or received from another shipper for "a like and contemporaneous
 service in the transportation" of anthracite coal between the same
 points, in violation of section 2 of the Act to Regulate Commerce,
 and further charges that from August 1, 1901, to July 17, 1907, the
 defendant company demanded and received from plaintiff's firm
 unjust and unreasonable rates for the transportation of anthracite
 coal from the Wyoming region in Pennsylvania to Perth Amboy,
 New Jersey, in violation of said act.

In support of this charge, it is alleged in the petition, as follows:
 That defendant is a common carrier engaged in interstate railroad
 transportation between points in the states of Pennsylvania, New
 Jersey and New York, and is largely engaged in transporting an-
 thracite coal for plaintiff and other shippers over its line
 175 from collieries in the Wyoming coal region of Pennsylvania
 to Perth Amboy, in the state of New Jersey; that one of said
 shippers other than plaintiff is the Lehigh Valley Coal Company,
 a corporation of the state of Pennsylvania, engaged in the business of
 mining and buying anthracite coal in said Wyoming region.

Plaintiff alleges that from November 1, 1900, to August 1, 1901,
 the defendant company, intending to unjustly and unreasonably dis-
 criminate in favor of, and to prefer, the Lehigh Valley Coal Com-
 pany to the plaintiff and other independent shippers, unlawfully
 charged the plaintiff with excessive and discriminatory rates on
 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of
 pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rick
 coal, shipped between the said Wyoming coal region and Perth
 Amboy, New Jersey, the total charges on such coal amounting to
 \$129,989.18, whereas, had the plaintiff been given the benefit of the
 rates charged by defendant for similar shipments of the said Lehigh
 Valley Coal Company, the total charge upon plaintiff's said ship-
 ments would have been \$11,909.33 less than the sum exacted as above
 during the period aforesaid, which sum, with interest thereon from
 August 1, 1901, was awarded by the Interstate Commerce Commis-
 sion in favor of the plaintiff, in their supplemental report dated Ma

7, 1912, as also in their orders supplemental thereto, issued June 8 and 15, 1912, attached to said petition and marked Exhibits "A," and "B," respectively.

Plaintiff further alleges that from August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner, over its said line of road from the Wyoming coal region, aforesaid, to Perth Amboy, at tide water in New Jersey, the following unreasonable and excessive charges upon all shipments of anthracite coal, to wit: \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 per ton for coal smaller than buckwheat coal. That from August 1, 1901, to July 1, 1907, these shipments amounted to 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and that the charges paid thereon amounted to \$685,375.27, at rates exceeding \$1.40 per gross ton in prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat coal, the rates fixed by the Interstate Commerce Commission as proper and reasonable, the amount of such excess being \$58,236.45, paid by plaintiff to the defendant. That said payments were made under protest that the same were unreasonable and excessive.

The petition then recites that on July 17, 1907, plaintiff filed with the Interstate Commerce Commission a complaint, setting forth the aforesaid unreasonable and discriminatory practices and charges of defendant, to the prejudice of the plaintiff and in violation of the Act to Regulate Commerce, and praying for a hearing upon the allegations set forth in said complaint, and that the commission make an order, requiring the defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line, from the Wyoming region to tidewater at Perth Amboy, and awarding complainants reparation in damages in such amount as they might have suffered loss by reason of said improper practices and charges. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the complaint regularly heard and argued by all the parties thereto, and submitted. A report was duly filed by the said commission on June 8, 1911, in Docket No. 1180, a copy of which report, with the conclusions and orders of the commission, is attached to plaintiff's petition as "Exhibit C."

By this report the Interstate Commerce Commission held that the charges by the defendant company to the plaintiff, between November 1, 1900, and August 1, 1901, were discriminatory, and therefore unlawful, and also that the charges of defendant company, between August 1, 1901, and July 1, 1907, were unreasonable, and the same were ordered to be discontinued, and that reasonable and proper charges for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid, should thereafter be \$1.40 per gross ton on prepared sizes, instead of \$1.55, the rate charged, and \$1.30 on pea coal, instead of \$1.40, the rate charged, and \$1.15 on buckwheat coal, instead of \$1.20, the rate charged, and the commission held "that reparation

should be awarded upon the basis of the rates herein found to be reasonable, upon all shipments of coal by complainants from the Wyoming region to Perth Amboy, since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants."

Plaintiff's petition further recites that a hearing was had upon the question of reparation, and that a supplemental report was filed by said commission May 7, 1912. In this report, attached to the petition and marked "Exhibit A," the commission state "that the original report in No. 1180 disposed of all the questions at issue except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature.

178 further hearing has been held and complainant has presented exhibits, showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct."

They then refer to their finding in the original report, that the rates exacted by defendant from November 1, 1900, to August 1, 1901, were unjustly discriminatory and in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and the defendant, and to the further finding in said original report, that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, to the extent that they exceeded rates of \$1.40 per gross ton on prepared size \$1.30 on pea, and \$1.15 on buckwheat.

They then proceed to say that on the basis of their conclusion in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, they now find that, during the period from November 1, 1900, to August 1, 1901, in regard to the charges exacted from plaintiff and found to have been unjustly discriminatory, that complainant was entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. And they further find, in regard to the rates exacted for coal shipped by plaintiff from August 1, 1901, to July 17, 1907, which were found unreasonable in the original report, that plaintiff is "entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45, from September 1, 1911."

Following said supplemental report, and on the same day, to wit May 7, 1912, a so-called supplemental order was entered, which, amended in an unimportant particular May 15, 1912, reads as follows:

179 "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having

been had, and the commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the fifteenth day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of six per cent. per annum from the first day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region, in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the commission.

"It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the fifteenth day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of six per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of six per cent. per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments
180 of anthracite coal from the Wyoming coal region in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unreasonable, as more fully and at large appears in and by said report of the commission."

The petition then avers that a true copy of this order of the commission was duly served upon the defendant, and demand made for payment of the sum claimed in the petition, and as set forth in the aforesaid orders of the commission and attached to the petition as Exhibits "A" and "B," but the defendant had failed and refused to pay the said sums, or any part thereof. "Wherefore," it is alleged, "petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce." (The theory of the petition thus appears to be that this is a proceeding to enforce the order of reparation made by the commission, and not a suit for the recovery of such damages as plaintiff has actually incurred by reason of the alleged unlawful acts of defendant, as found by the commission.) The court is then prayed to enter a rule upon said defendant to file a plea, answer, or demurrer to the petition within thirty days from the date of serving a copy of the same, and to fix a time and place for the trial of the cause under the provisions of the Act to Regulate Commerce.

The defendant accordingly filed, October 5, 1912, its plea of the

general issue, the bar of the statutes of limitation applicable to plaintiff's claim, and for a further plea averred that the Interstate Commerce Commission had no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce, and that there was before the commission no substantial evidence to sustain its findings and order.

181 At the trial, the plaintiff put in evidence the report of the commission, dated June 8, 1911 (see Record, pp. 22-73), and the order thereon of the same date, requiring the defendant to abstain from charging or receiving its present rates for the transportation of coal so found to be unreasonable, and requiring defendant for a period of two years thereafter to maintain the rates found in said report to be reasonable. Also, the supplemental report of the commission, dated May 7, 1912, finding the reparation or damages to which the plaintiff was entitled, and the supplemental order of that date, amended by that of June 15, as hereinbefore set out, requiring the defendant to pay to plaintiff, on or before the first day of August, 1912, the sums found due as and for reparation in said supplemental report.

Save the testimony of the plaintiff (Meeker), bearing upon the charge of discrimination as to freight rates between November 1, 1900, and August 1, 1901, no evidence, other than these four papers, was offered by plaintiff at the trial. The defendant offered no testimony, except that of Mr. George W. Field, one of its counsel, who attended the hearing before the Interstate Commerce Commission and made certain calculations from Exhibits "A" and "B," offered in evidence by defendant, dividing up the shipments therein set out between different dates, to which the different statutes of limitation might apply. Plaintiff's contention was and is, that these four papers, in the absence of any evidence on the part of the defendant, made out a prima facie case in his favor and entitled him to a recovery, as damages, of the amounts awarded by the commission.

This was the view taken by the learned judge of the court below, in submitting the case to the jury, and a verdict was accordingly rendered in favor of the plaintiff for the aggregate sums

182 awarded by the commission, as reparation, which, with interest thereon, amounted to \$109,280.17. To the judgment thereon, this writ of error is sued out by the defendant. Certain of the assignments challenge the constitutionality of section 16 of the Act to Regulate Commerce, on the ground that its provision, that the findings and order of the commission shall be prima facie evidence of the facts therein stated, is unconstitutional, in that it confers judicial power upon an administrative commission, deprives the defendant of its property without due process of law, and denies to it its right of trial by jury; and also, on the ground that the provision of said section, conferring upon the commission authority to determine and award damages to any party complaining of the violation of the act by a common carrier and to direct such carrier to pay to the complainant before a day named the sum so awarded, and declaring that, on a trial of a suit to recover such damages, the facts stated in the findings and order of the commission shall be

prima facie evidence of the facts therein stated, is not a proper exercise of the powers given to Congress to regulate commerce. The latter point was raised before this court in the case of *Western New York & P. R. R. Co. vs. Penn Refining Co.*, 70 C. C. A. 23. We there said:

"The constitutionality of the provisions making findings of fact prima facie evidence before a jury, has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guaranty relative to trial by jury in the courts of the United States, does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision, counsel for the plaintiff in error does not attempt a reargument of the question before this court.

183 The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute. The questions raised by the assignments of error which are most material, relate to the submission of the reports and orders of the Interstate Commerce Commission, and to how far and in what respect the same are to be taken as prima facie evidence of facts stated by them. Also, the question whether the facts of which such reports and orders are the prima facie evidence, are sufficient, in the absence of countervailing testimony by the defendant, to maintain the plaintiff's suit and claim for damages.

This court has already, in a decision at this term, in the case of *Lehigh Valley Railroad Co. et al. vs. J. Mitchell Clark et al.*, discussed at some length the history of the legislation embodied in the Act to Regulate Commerce, and its amendments. As we there pointed out, section 14 of the original act made it the duty of the commission to make a report in writing, which should include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 16 provided for the refusal or neglect "to obey any lawful order or requirement of the commission, by authorizing the commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States, sitting in equity, and empower such court, as a court of equity, to hear and determine the matter," etc. And on such hearing, the report of said commission shall be prima facie evidence of the mat-

184 ters therein stated. And it was provided that if it be made to appear to the court "that the lawful order or requirement of said commission, drawn in question, has been violated or disobeyed," the court may issue "a writ of injunction, or other proper process, mandatory or otherwise, to restrain the common carrier from further violation or disobedience of such order."

From the fact that it was to a court of equity alone that resort was to be had for the enforcement of an order of the commission,

it was apparent that it was only to such ministerial orders of the commission as could be enforced by a court of equity, that the act in this respect could apply, and that a recommendation or an award of damages by the commission was not such an order or requirement as could be thus enforced without a violation of the seventh amendment to the Constitution, in regard to jury trials. This consideration suggested the Act of March 2, 1889, amending section 16 of the original act by adding thereto the following:

"If the matters involved in such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the Constitution of the United States, and any such common carrier shall violate or refuse, or neglect to obey or perform the same, after notice, etc., * * * it shall be lawful for any company or person interested * * * to apply in a summary way, by petition, to the Circuit Court of the United States, sitting as a court of law, * * * alleging such violation or disobedience as the case may be."

Then, after providing for a jury trial, the amendment concludes:

"At the trial, the findings of fact of said commission, as set forth in its report, shall be prima facie evidence of the matters therein stated."

185 The distinction thus clearly made between reparation and non-reparation cases, is made still more clear in the so-called "Hepburn" Act of 1906, in which section 14 was amended so as to read as follows:

"That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

This distinction was still further emphasized by so amending section 16 as to provide that, where, after hearing on a complaint, the commission should determine that complainant is entitled to an award of damages, it

"shall make an order, directing the carrier to pay to the complainant the sum to which he is entitled, on or before the day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file in the Circuit Court of the United States for the district in which he resides, * * * a petition, setting forth, briefly, the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that, on the trial of such suit, the findings and order of the commission shall be prima facie evidence of the facts therein stated."

After other provisions, the section, as amended, further provides (the italics being ours):

"If any carrier fails or neglects to obey any order of the commission, *other than for the payment of money*, and while the
186 same is in effect, any party injured thereby, or the commission in its own name, may apply to the Circuit Court in the

district where such carrier has its principal operating office, * * * for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise."

Thus, the inherent and obvious distinction between reparation and non-reparation cases is clearly recognized by Congress. It could hardly be otherwise than that such recognition should be made. The great purposes of the act are largely accomplished by the administrative control given to the Commerce Commission over all carriers, as to interstate commerce, and that administrative control is made efficient by the peculiar jurisdiction of a court of equity, to which the commission or a party interested may apply for the enforcement of its orders. In such cases, the whole record of the investigation by the commission is before the court, and the only matter to be determined is that the order made by the commission is a lawful order; that is, made within the scope of the authority conferred by Congress, and upon a full hearing of the parties, with the opportunity accorded of adducing testimony and having it considered. (I. C. C. 187 et al. vs. Louisville & Nashville R. R. Co., lately decided by the Supreme Court of the United States and not yet reported.)

When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the commission as an administrative body, and of enforcing its proper control over interstate commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a quasi public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the kind are determined, by a jury trial at common law.

The right to a jury trial having thus been preserved by the provisions of the act above referred to, under them "the parties are entitled," as said by us in *Western New York & P. R. R. Co. vs. Penn Refining Co.* (supra), "to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards, furnished by a proper application of the principles of evidence and the proper submission of the case to the jury." This right of trial by jury is not granted, as of grace, by the act, but is a constitutional right of which the defendant cannot be deprived. The consistency and harmony of the reparation proceed-

ings as authorized by the act, with the administrative features thereof, are, however, as pointed out by the Supreme Court in *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, maintained, by Congress having made, in the exercise of its legislative power as to the law of evidence, the "findings and order of the commission prima facie evidence of the facts therein stated."

In all other respects, a suit under the act shall proceed "like all other civil suits for damages." We cannot give less than full meaning and effect to this language. What may be the facts or classes of facts, to which this provision of the act applies, must be the important question in this, as in other cases, for the determination of the court. As under the decision in the *Abilene* case, the literal language of the act, in allowing a complainant as to all matters, to bring an independent common law action for damages, cannot be reconciled with the general scope of the act, or with other particular provisions thereof, a suit for damages must in all cases calling for an exercise of the discretion of the administrative and rate-regulating body, be founded upon a previous application to and investigation by the Commerce Commission, and instituted with reference to "rights recognized in or to duties imposed by the act." We think, therefore, it clearly follows from the premises:

(1) That the finding of the commission as to the reasonableness or otherwise of the rate charged by the carrier in interstate commerce, is an administrative function properly and constitutionally delegated by the legislative power to the commission, and is, if lawfully made, conclusive. If such finding of the commission is, that a given rate charged by a carrier in interstate commerce is unreasonable, it is as if the unreasonableness of such rate were fixed by the statute. The lawfulness of such finding is subject to judicial inquiry only in the respects above referred to.

(2) The finding by the commission, that a given rate is unreasonable, while pertinent to the issue, in that it establishes a violation of the act, is not decisive of the question of liability for damages under section 8, in such case as the present, either prima facie or otherwise.

(3) The pertinency and evidential weight and value of the facts as to which the findings and order are prima facie evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a prima facie case for the plaintiff.

The importance of the exceptional privilege thus conferred upon the plaintiff, of not being required to prove, in the first instance, the facts found by the commission, makes it the more necessary that the court should point out to the jury what are and what are not such findings. The imperative command of section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the commission, with reference to their proposed use in a jury trial, and evidently with this understanding, the original rule of the commission was made, that "upon the final submission of the case to the commission, either party may submit proposed findings of fact for the consideration of the commission,

which findings must embrace only the material facts of the case supposed to be established by the testimony."

No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the commission, what were properly to be considered such findings. We can only reiterate what was said by us in the Penn Refining Company case (*supra*):

"While not expressing the opinion that findings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be disregarded. Unless this course be pursued, the parties are deprived, at least in part, of the benefits and safeguards intended to be secured to them under the constitutional guaranty of a trial by jury."

It will be remembered that the only evidence adduced by the plaintiff in support of his claim for damages at the trial, consisted of the four documents to which we have above referred, viz:

(1) The original report of the commission, dated June 8, 1911, occupies fifty printed pages of the record. In this report the commission find that the complainants have sustained the allegation of unjust discrimination under the second section of the act, and that reparation, with interest from August 1, 1901, will be awarded on this account. At the close of their report, they find, as follows:

"After careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits, respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy * * * are unreasonable so far as they exceed"

a certain amount. (This finding, as defendant contends, is not a finding that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, but that the then present rates, as they existed at the date of the report, were unreasonable.) The opinion is then expressed that reparation should be awarded upon the basis of the rates found in said report to be reasonable.

(2) This report is followed by an order of the same date, commanding the defendant "to desist, on or before the fifteenth day of August, 1911, and for a period of two years thereafter, from charging or demanding its present rates, and that defendant be required to establish, on or before said date, and maintain for a period of two years thereafter, rates not in excess" of the rates therein specified.

(3) A supplemental report, made by the commission, May 7, 1912, which states that the original report disposed of all the questions at issue, except the claim for reparation, and that the case was held open for further information regarding that feature. It then states that a further hearing had been held and complainant had presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on the

amount of such shipments. They then say that in their original report they had found that the rates charged complainant for transportation of coal during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory to an extent named, and that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, so far as they exceeded rates established as reasonable by the commission. This latter reference to the original report is, as claimed by the defendant, inaccurate. They then say that, on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation (which is nowhere set out), they find, first, the number of tons of the various sizes of coal shipped by complainant over defendant's road from November 1, 1900, to August 1, 1901, and the amount of the charges thereon, and that complainant

192 has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid had he had the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company. Second, they find the number of tons shipped by plaintiff over defendant's road, from August 1, 1901, to July 7, 1907, and the charges paid thereon, "at the rates found to have been unreasonable"; and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid at the rates found reasonable.

(4) By the supplemental order issued on the same day, to wit, May 7, 1912, and amended June 15, 1912, which we have heretofore quoted in extenso, the defendant is required to pay, as reparation, to the plaintiff the amount found to have been unjustly discriminatory, and also the amount charged by said defendant over and above the amounts found to be reasonable by the commission.

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14, that "in case damages are awarded, such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report, there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the commission, all of which were irrelevant to an award of actual pecuniary damage.

The assignments of error are numerous, but for the purposes of this case, we may confine our attention to those 193 which are founded upon the admission by the court, over the objection of the defendant, of these four papers, as evidence before the jury, without discrimination on the part of the court as to the evidential value of the opinions, statements, arguments and conclusions contained therein; to those upon the failure of the court to clearly separate and distinguish, for the benefit of the jury,

the findings of fact from the incompetent matter contained in such reports, and to direct that the latter be wholly disregarded; and to those founded upon the portions of the charge of the court, in which the jury are in effect told that the award of damages made by the commission against the defendant, in the orders of reparation pursuant to its report, was, in the absence of controlling testimony on the part of the defendant, binding upon the jury.

The reparation report of May 7, 1912, contains no findings of fact, but merely refers to the original report of June 8, 1911, "as disposing of all the questions at issue, except the claim for reparation," and is silent as to the information and evidence that may have been adduced before it relevant to that claim. The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff. It is quite conceivable that, though, in the performance of its administrative function, the commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it. As said by Mr. Commissioner Clements in a public address:

194 "It often happens, in the attempt at reparation for wrongs accomplished, that the party most injuriously affected has no standing in law to claim reparation, for the reason that he was not the shipper and had no dealing with the carrier—he may have been the producer, consumer, or the dealer, and yet the price at which he sold or bought may have been so affected that ultimately he had to bear the burden of the increased rate, although it was paid directly, in the first instance, by the shipper."

The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.

The contention of the plaintiff, sanctioned by the court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a *prima facie* case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the statute, to recover damages, in which the causes for which plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages.

The learned counsel for the plaintiff has not pointed out in his

brief, nor claimed in his oral argument that there are any findings of fact upon which the award of damages was made by the commission, except its conclusion as to the existence of a discriminatory charge between 1900 and 1901, and of an unreasonable charge between 1901 and 1907, and those findings of fact and circumstances tending to establish the same. A careful reading of the fifty pages of this report does not disclose any specific findings of fact bearing on the award of reparation, other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it, on the charges of discrimination and of unreasonableness.

Granting, however, that these papers, including this long report in which the findings of fact alone are to be looked for, were admissible, as has been already indicated, it was clearly the duty of the court below to point out such portions of the voluminous record as alone should be considered findings of fact, within the meaning of section 16 of the act. We think in this respect the court has failed to assist the jury in the proper conduct of the case, to the detriment of the defendant. It can hardly be denied that such instructions were not only due from the court to the jury, but that without them, these papers, including this voluminous report of the commission, which in itself constituted a fair sized book, should not have been admitted. The record discloses the fact that, when this report of June 8, 1911, was offered in evidence, it was objected to by the defendant, on the ground that it contained no findings of fact, as required by the statute, or which are material or relevant in a reparation suit. Counsel for plaintiff said in reply:

"There are certain findings of the commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the commission may make."

196 Upon further objection by counsel for defendant, on the ground that

"The report contained many statements purporting to be statements of evidence in the hearing before the Interstate Commerce Commission, arguments, opinions, and conclusions, which the statute does not purport to make admissible as prima facie evidence,"

counsel for plaintiff said in reply:

"I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, statements of an historical character, which I think under the cases, the court should control in submitting the case to the jury, and direct their attention to the facts found in the report."

The COURT: "Then your idea is simply to offer the report in evidence, for the purpose of proving that there was an order made, and all relevant material in support of that evidence?"

COUNSEL FOR PLAINTIFF: "Yes, sir."

The COURT: "The court will, of course, indicate to the jury what of the report is relevant."

After this very significant colloquy, the report was admitted in evidence, and afterwards, at the close of the testimony, the record states that counsel for the defendant "read to the jury what he stated to be material portions of said exhibits." It is not stated, however, in the record, what portions were so read; and we look in vain for any directions by the court to the jury in regard to this important matter.

197 The following extracts from the charge indicate the theory upon which the court below submitted the case to the jury, and the attitude of the court towards these reports and orders of the commission:

"It is objected here, gentlemen of the jury, that these reports made by the commission, upon which this suit is based, are not in accordance with the requirements of this act and, therefore, you should find for the defendant. But I instruct you, gentlemen of the jury, that they are, in the judgment of the court, in accordance with the requirements of this section. They state the conclusions as required by the act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit."

* * * * *

"In the presentation of this claim to the court and the jury, the Act of Congress *gives the report* a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a jury, for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution. But in that proceeding, the suit is *on the report* of the finding of the Interstate Commerce Commission, and their finding is made *prima facie* evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, and *that makes its prima facie* case of its right to claim." (The italics are ours.)

198 There is no attempt here, or elsewhere in the charge, to separate from the mass of statements in the report what might be considered findings of fact, or to instruct the jury that the statute, in making such findings *prima facie* evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the court gave

the jury to understand that the report and findings of the commission as to discrimination and unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the commission need not be proved in the suit for damages, but that such findings or order shall be *prima facie* evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order *prima facie* evidence of certain facts, but it does not make, or attempt to make, such facts *prima facie* evidence of anything.

Since the hearing and determination of this case, as also of *Lehigh Valley Railroad Co. vs. J. Mitchell Clark, et al.*, the Supreme Court has promulgated an opinion and decision in *Pennsylvania Railroad Co. vs. International Coal Mining Company*. This decision bears directly upon some of the fundamental questions involved in the case now under consideration, as it did in those involved in the Clark case, above referred to. On the vital point, whether in this suit, "like other civil suits for damages, actual damage must be proved, we again quote the language of Mr. Justice Lamar:

"There were many provisions of the statute for imprisonment and fines. On the civil side, the act provided for compensation—not punishment. Though the act had been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons vs. Railway*, 167 U. S. 46, in construing this section (8), 'before any party can recover under the act, he must show, not merely the wrong of the carrier, but that the wrong has in fact operated to his injury.' Congress had not thought and has not since given any indication of an intent that persons injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

After referring to quite a number of cases relied upon by plaintiff, Mr. Justice Lamar says they "do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

It hardly needs to be pointed out, as we did in the Clark case, that the ratio decidendi of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also distinctly decides that, in the absence of proof of actual damage to that extent the amount of the rebate charged and proved to have been made to the defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. Nor more in this case can the difference between what is found

200 the commission to be the unreasonable tariff rate and that fixed as a reasonable one, he made the measure of the damage that the plaintiff has suffered. As pecuniary damages are neither alleged in the pleadings nor proved in the trial, the plaintiff made out no case upon which recovery of damages could be had.

For the reasons above stated, we think the judgment below should be reversed, with directions for a venire de novo.

There was a second complaint made to the Interstate Commerce Commission by defendant (Meeker), in his own name, dated April 13, 1910, pending the proceeding in his first complaint filed July 17, 1907. In the former complaint, as we have seen, the commission were dealing with the question of the unreasonableness of the rates on anthracite coal from the Wyoming region to Perth Amboy, between August 1, 1901, and July 17, 1907, whereas the second complaint dealt with the same charges or rates between July 17, 1907, the date of the filing of the first complaint, and April 13, 1910. The supplemental report of the commission, dated May 7, 1912, was a blanket report and covered both complaints. As to the later case, the report, after dealing with the former, said:

"With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation upon shipments which move between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions
201 announced in that report. * * *

The former case was filed with the commission within one year from the passage of the law of June 29, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is therefore subject to the two-year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case, must be denied.

"On basis of our decision in No. 1180, upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant,"

the commission find that the rates exacted by defendant during the two years prior to the filing of his last complaint, were unreasonable to the same extent as found in the report as to the former period from August 1, 1901, to July 17, 1907. The report in this latter case does not purport to include the statements and findings of the original report, or of the supplemental report in regard to the former case. It merely makes a finding of unreasonableness on the basis of their decision in No. 1180. How far it is competent for the commission to proceed upon findings and evidence in a former and distinct case, by merely referring to the same, need not now be decided. The suits in the court below, as to both cases, were tried and sub-

mitted to the jury together, upon the same instructions as to the prima facie character of the report and the award. Therefore, what has been heretofore said in regard to the former case, is applicable to the latter, and need not be repeated.

The judgment, therefore, in the second case must also be reversed with directions for a venire de novo.

202 The second paragraph of section 16 of the act concludes as follows:

"All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit or state court, within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of the act may be presented within one year."

The manifest intention of Congress here, as in all statutes of this kind, was to prevent the accumulation of claims until they became stale, and to compel those who felt themselves aggrieved by the wrongs exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims accruing prior to that date which had accrued as far back as 1887, might be presented to the commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with those whose claims had accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the commission. It would be a harsh construction, never, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it did not mean to preserve the two years' limitation, both for claims before and after the act. We conclude, therefore, that the commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905.

203 & 204

205 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,
vs.

HENRY E. MEEKER, Defendant in Error.

March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,
vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker & Company, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

On Rehearing.

Before Gray, Buffington, and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

The able and interesting argument at the rehearing in this case has challenged the careful reconsideration by the court of the grounds upon which were based the conclusions announced in their original opinion.

206 We had already, at the same term, discussed very fully the Interstate Commerce Act of 1887, with the amendments of 1889 and 1906, relevant to the questions now presented, in the case of the Lehigh Valley Railroad Company vs. J. Mitchell Clark, et al., 207 Fed. Rep. 717. We therefore considered it unnecessary to repeat that discussion and analysis of the act and its amendments in the opinion filed in the present case, though we applied the principles of that decision thereto.

With this reference to our opinion in the Clark case, we confine ourself to what seem to us the crucial questions raised by the petition for, and argument at, the rehearing.

Premising what we have before said, that the provisions of the act, granting a right of action to shippers for damages incurred in consequence of violations of the act by the interstate carrier, while important, are incidental and not primary, in the scheme of the act for the control and regulation of the actual operation of interstate commerce, in the general interests of the public, let us again consider the nature and scope of such right, as disclosed by the language and general purposes of the statute creating it.

The learned counsel for the defendants in error, in his argument at the rehearing, contended with much insistence that the act, in denouncing unreasonable rates and creating a liability to the shipper therefor, was merely declaratory of the common law, and in support of this proposition, cites the following language in the opinion of Mr. Justice White, in the Abilene Cotton Oil case, 204 U. S. 426, 436:

“Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy, 207 that when a carrier accepted goods without payment of the cost of carriage, or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that, even where on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge.”

From this it was argued that (we quote from defendant in error's supplemental brief): (1) “The measure of damage was clearly the difference between the unreasonable rate paid and the reasonable rate. (2) That all that the shipper had to establish, consequently, was the amount of the charges which he had paid, and what the reasonable charge would have been. (3) Having established these facts, the shipper was entitled, as a matter of law, to recover the difference between the two rates—that is the overcharge.” These propositions constitute the gravamen of defendant in error's whole argument.

In the case quoted from, the Supreme Court was dealing with a judgment in a state court, where suit had been brought to recover damages from the defendant company by reason of the exaction of an alleged unjust and unreasonable rate, which exceeded in the aggregate, by the sum sued for, an alleged just and reasonable charge. There had been no application to, or finding by, the Interstate Commerce Commission, in regard to the unreasonableness of the rate. Mr. Justice White conceded these common law rights of action, but proceeded to show that they were repugnant to the provisions of the

Interstate Commerce Act, which was intended “to afford an 208 effective and comprehensive means for redressing wrongs resulting from violations of the act,” and that a shipper cannot maintain an action at common law for excessive and unreasonable freight rates exacted on interstate shipments, where rates charged had been duly fixed by the carrier according to the act, and not found to be unreasonable by the commission. We think this whole opinion tends to emphasize the distinction between the common law rights of action referred to, and the right of action created and defined by the act. A situation where the rates paid were the rates fixed by the act, as the only legal rates that could be demanded or paid, even though those rates are declared afterward by the commission, in the performance of its administrative function, to be unreason-

able, differs essentially from a situation where an illegal rate is, in the first instance, coerced or extorted by the carrier. The tariff rate paid by the shipper was the legal rate, any departure from which is made by the statute a misdemeanor and punishable by fine. There is consequently no "overcharge" to be recovered as such, as in the cases cited at common law, and no coercion except that of the law. It is obvious that, even though the statute were silent as to the measure of damage applicable to the first situation, that measure could not justly be the same as in the second. That section 22 does not help the argument of the defendant in error in this respect, is shown by Mr. Justice White, when he further says:

"It is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the Act to Regulate Commerce, viz., 'Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act."

We repeat that this decision of the Supreme Court so far from sustaining the contention of the defendant in error, that the Interstate Commerce Act was merely declaratory of the common law, and that the common law measure of damage was applicable to the liability created by section 8 of the act, clearly distinguishes the liability at common law, as it existed in the cases cited by Mr. Justice White, from that created by the act for every violation of its provisions. We turn to the pertinent provisions of the act.

After requiring that all charges by common carriers for transportation shall be just and reasonable, and inhibiting unjust and unreasonable charges for such service, prohibiting rebates and unreasonable preferences, and declaring the same to be unlawful, the statute, in section 8 thereof, and there alone, creates the liability with which we are here concerned. We again quote from that section:

"That in case any common carrier, subject to the provisions of this act, shall do * * * any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act * * * in this act required to be done, such common carrier *shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.*" (The italics are ours.)

The learned counsel for the defendant in error seems to argue that this statute creates a general liability, independent of any relativity, limitation or qualification, as soon as a violation of the act is shown.

That this is not so, is apparent. It is not a general liability that is imposed by the act, but a particular liability to the person injured "for the full amount of damages sustained in consequence of any violation of the provisions of the act." The liability thus defined is the only civil liability anywhere imposed, and no other or different civil liability can attach itself to any violation

of the act. The liability thus imposed being the same for all violations of the law, without exception, that liability, as defined by the statute, is to the "person or persons injured for the full amount of damages sustained in consequence of any such violation of the provisions of this act." We cannot avoid the plain and exigent meaning of this language. It is impossible, in view of it, to attribute to Congress an intention to apply it to only a portion of the offenses against the act.

The logic of the situation, as recognized by the decisions of the Supreme Court in the Abilene and other recent cases, would seem to be, that a civil suit for damages may be brought under sections 8 and 9 in the District Court of the United States, for any violation of the act; that, if the violation be a simple disobedience of a specific requirement of the statute, whether of omission or commission—such, for instance, as giving a rebate—nothing more is required than to prove that specific act, and no finding of the commission is necessary to the jurisdiction of the court; but, where the illegality of the act charged depends upon whether it be reasonable or unreasonable, the option given by section 9 cannot be literally interpreted, as the determination of this issue calls for an exercise of the discretion of the administrative body. When that administrative function has been performed, and the rate complained of has been found to be unreasonable or unjust, such finding is conclusive, whether it relate

to past or present rates or practices. As said by Mr. Justice Lamar, it is as if the reasonable rate or practice was established in the statute itself. It would then only be necessary to prove in court this finding of the commission, that such a specific act or practice was unreasonable, and therefore unlawful under the act, just as it was only necessary, without any finding of the commission to that effect, to show that a specific rebate has been given that was declared unlawful by the act itself. The further procedure in the case supposed, as indicated by the act, must be in all respects "like other civil suits for damages," except that the plaintiff may, in proving his pecuniary loss or damage, in consequence of a violation of the act by the defendant, use the facts stated in any finding or order of the commission in support of his claim, without further proof of such facts, supplementing the same by other evidence as, in his judgment, the exigence of the case may require.

Referring to a contention in the International Coal Company case, that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the commission, Mr. Justice Lamar, in the recent Mitchell Coal Company case, said:

"This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the commission and not the courts should pass upon that administrative question. When

such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statutes. But since the commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited.”

From this illuminating view of the requisite procedure under the act, harmonizing as it does its different provisions and “giving every shipper equal rights and preserving uniformity of practice,” it would seem that all other shippers than the complainant might bring their several actions in the District Court, “for the full amount of damages sustained in consequence of” the same violation of the act, without any further finding by the commission. It having once been established what particular conduct or practice of the carrier was illegal, it would only be incumbent on a plaintiff to show the damage, if any, sustained thereby. No award of reparation, therefore, would be necessary in such cases to the jurisdiction of the court, the suits being cognizable under sections 8 and 9, as in the case of suits for damages occasioned by rebates or other specific violations of the act.

From this it seems irresistibly to follow, that all shippers prosecuting suits for damages “sustained in consequence of any violation of the provisions of the act,” are on the same footing, whether the violation be a specific act made illegal by the statute, or one in which the illegality of the act depends upon the finding of fact by the commission, that the act or practice complained of is unreasonable or unjust. In like manner it follows that the measure of damages sustained by a shipper in consequence of any violation of the act, must be the same in all cases. We find no authority in the act itself, or in the decisions of the Supreme Court, for applying a different measure of damage in the case of any violation of the act, than that established by the eighth section, viz., “the full amount of damages sustained” by reason thereof. To hold that, in one case actual damage must be proved, and in the other not, introduces a confusion in the administration of the law, for which the only justification must be the express and mandatory requirement of the statute, or the express and controlling decision of the Supreme Court. The measure of the statute is thus stated by the Supreme Court in the International Coal Mining case:

“The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that, in a suit at law both the fact and the amount of damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this conten-

tion is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record."

This statement of the Supreme Court is general, and is applicable to any and all cases where damages are sought by one claiming to have been injured by a violation of the act. It would seem to dispose of the contention of the defendants in error, referred to above and approved by the court below, that "the shipper was entitled as matter of law to recover the difference between the two rates," that is, the tariff rate charged to the shipper, and the lower rate found to be reasonable by the commission. Herein is the essential

214 vice of defendant in error's argument, that the fact and amount of pecuniary loss in a case like the present, is matter of law, and not of fact to be determined by the jury. It does not help the matter that the defendants in error argue that the rate charged having been conclusively found by the commission as unreasonable, the award of the difference between that rate and the rate found to be reasonable is only *prima facie* evidence of the liability of defendant for the amount so awarded. The act makes nothing *prima facie* evidence of the liability created by section 8. The *prima facies* mentioned in section 16 is attached to the facts stated in the finding and order of the commission, which facts may or may not be sufficient to establish that liability.

Section 16 of the original act has been so amended as to meet the objection that was made soon after its enactment, that in reparation cases, the order of the commission could not be enforced by a summary proceeding in a court of equity, as administrative orders were enforced, and that the liability for the damages actually sustained by a shipper, by reason of a violation of the law, could, conformably to the seventh amendment of the Constitution, only be enforced, as are other liabilities of that kind, by a suit at common law. This recognition by Congress of the necessity of conforming to the requirements of the seventh amendment, is, of course, inconsistent with any interpretation of the ninth section, from which it could be inferred that a person claiming to be damaged by any common carrier might "elect" to pursue his claim for damages before the commission, as his final and efficient remedy, and procure an award for the payment of the same, enforceable as such in a court of law, as an administrative order is enforceable in a court of equity. The

215 successive amendments by which section 16 was brought into its present shape, attest the earnest purpose of Congress to meet the situation. Suits to enforce the liability created by section 8 were made available to the person injured in all cases, not only where the violation of the statute was an act or practice denounced as illegal by the law itself, but also where such act or practice was only made illegal by the finding of the commission.

Sections 13 and 15 having provided that the commission was authorized, either upon complaint or upon its own initiative, to declare, upon investigation, any rates or practices unjust or unreasonable, section 16 provided for a case where, after the complaint and investigation, an award, or, as it was called in the original act, a

recommendation, of damages was made by the commission. If not complied with by the defendant within a time specified, the complainant was authorized to file in a Circuit (District) Court of the United States, or in any state court of general jurisdiction, a petition setting forth briefly the causes for which he claims damages and the order of the commission in the premises. "Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages." This is in effect authorizing in the special case described a common law suit for damages, as contemplated by sections 8 and 9, in all cases where damages are claimed consequent upon a violation of the law.

It is true, that the law makes an exception to the ordinary rule of evidence in such cases, by providing that facts stated in the findings or order of the commission need not again be proved by the plaintiff, the finding and order being made *prima facie* evidence of such facts. Such facts may or may not be relevant to the question of the liability for, or amount of, damages claimed. Their evidential value in this respect is for the court and jury trying the case. This

216 *prima facie* of the facts found is an advantage of considerable moment to the plaintiff. It is an expressed exception to the ordinary rule of evidence, and should not be extended by implication. It must be confined to the precise meaning of the language of its enactment. If the intent of the legislative mind had been to go further and make, not only the findings of fact and order *prima facie* evidence of the facts stated, but also the conclusions of the commission on facts, *prima facie* evidence of the liability of the defendant for the amount of damages stated in the award, such intent should and would have found expression in the act. We are not to impute to Congress such an intention so violative of the fundamental rights of the parties to a suit at common law, and of the express guaranty of the Constitution in that regard. If more were wanted, we might refer to the language of section 14, which emphasizes the distinction between the "conclusions" of the commission and "the findings of fact on which the award is made."

The distinction between reparation and non-reparation cases, so anxiously made by Congress, in order to conform to the spirit of the seventh amendment, would be practically nullified, if, in prosecuting a suit for damages actually sustained by reason of a violation of the law, the liability for such damages, and the amount thereof, as found by the commission, must be conceded in the first instance. Is a defendant to be called upon, practically to prove a negative, and show that the plaintiff was not damaged, or that the amount claimed was less than that stated by the commission? These facts, or the facts upon which they depend, are all peculiarly within the knowledge of the plaintiff, and it is fundamental that neither party to a suit should be required to prove or disprove what is peculiarly within the knowledge of the opposite party.

217 Unwarranted as this contention may be, that the findings and order of the commission are *prima facie* evidence, not only of the facts therein stated, but of the conclusions of the commission in regard to the very subject-matter in litigation, it

is also still more unjust in these cases, because if sustained, it practically and substantially makes the award of the commission, not only *prima facie*, but conclusive evidence of the plaintiff's case.

The theory of the case, as presented by the defendants in error in their pleadings, as well as at the trial, and adopted by the court below, is that the suit was brought upon the award, *qua* award, instead of having been brought "to enforce a cause of action given by this section (section 8) to any person injured." It was brought "to recover what, though called damages, would really be a penalty." In accordance with this theory, plaintiff's contention logically follows that, when the commission finds that the rates charged were unreasonable, and what the reasonable charge should have been, the establishment of these facts entitles the shipper, as matter of law, to recover the difference between the two rates. In the present case, we have the unquestioned finding of the commission, that the rates charged were unreasonable, and that a certain lower rate was reasonable, and the difference between the two was expressly and avowedly awarded as damages to the plaintiff. Defendants in error contend and the court below states that the so-called facts, when shown at the trial, constitute a *prima facie* case for the plaintiff. If, however, the difference between the two rates is, as matter of law, the measure of damage sustained by the plaintiff, it is not only *prima facie* but conclusive evidence upon court and jury of the injury of the plaintiff and of the amount of damage to which he is entitled. Grant the premise, that plaintiff is entitled to recover, as matter of law, the difference between a reasonable and unreasonable
 218 rate found by the commission, and that the suit is for the recovery of that difference, as awarded by the commission the logical conclusion is, as stated by the defendants in error and the court below. This "logical conclusion," however, is a *reductio ad absurdum*, and therefore shows the falsity of the premises upon which it is founded.

Congress admittedly, by its successive amendments to the Act of 1887, sought to conform to the requirement of the seventh amendment, by providing that, where the matters involved were founded upon a controversy requiring a trial by jury, such a trial should be accorded. Can it be doubted that the parties, therefore, are entitled to a real trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right? If so, how wide of the truth is the contention that this right has been enjoyed by the defendant in the present suit?

We have already quoted one form in which the theory of the case is stated by the plaintiff below. In another place in his supplemental brief, it is thus stated:

"At common law, a shipper who had been charged unreasonable rates could recover the overcharge; and, under the statute, as soon as the commission had determined that there had been an overcharge, the shipper could recover in the same way, although, of course on the trial the carrier was at liberty to disprove, if it could, the fact of the overcharge established *prima facie* by the finding and order of the commission."

The "overcharge," as has been before stated in the same brief, can be nothing else than the difference between the reasonable and the unreasonable or tariff rate. How can the carrier be said to be "at liberty" to disprove that arithmetical fact? This difference, according to the theory of the court below,—though its payment has neither been "extorted" or "coerced," except by the law—is 219 the damage to which the plaintiff is entitled as a matter of law. Though stated to be *prima facie*, it is really, according to that theory, conclusive as to the injury of the plaintiff and the amount of his damage.

We need only for a moment compare this theory of a suit for damages with that which is established by the act itself. The sixteenth section nowhere says that the report, findings or order of the commission are *prima facie* evidence of the liability of the defendant, or of the amount of such liability. It only says, and we must again recur to its exact language, that the findings and order of the commission "shall be *prima facie* evidence of the facts therein stated." But clearly, such facts are not made *prima facie* evidence of anything. Their evidential value is for the court and jury to determine. They may or may not be sufficient to make a *prima facie* case, or they may, in the opinion of the court or jury, be of any other greater or less degree of probative force. These facts can be no other than those referred to in the fourteenth section, where it provides that, after an investigation, the committee shall make a report, "which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

In view of this, it would seem almost an abuse of language to say that the "facts," of which the findings and order of the commission are *prima facie* evidence, include the conclusions arrived at by the commission, as to the injury of the plaintiff and the amount of damages sustained. The measure of damage is not fixed by the statute to be the difference between a reasonable and an unreasonable rate, as a matter of law or otherwise. On the contrary, the eighth section

220 declares that the "common carrier" in this case, as in all others, "shall be liable to the person or persons injured for the full amount of damages sustained in consequence of any violation of the provisions of the act." What those damages may be, is a question of fact to be determined by the jury, and not a question of law. That is distinctly decided by the Supreme Court in the *International Coal Mining* case. This is the measure of damage established by the act itself, and must be conformed to in a case like the present. The language of the eighth section makes the measure of damage therein prescribed applicable to every violation of the act. Nor has the Supreme Court in any case decided otherwise. Its reasoning as to the measure of damages established by the eighth section, is also applicable to every violation of the act,—to one that depends for its illegality upon a finding of the commission, as well as to one where such finding is unnecessary. The argument to the contrary is largely technical, and tends to make a mockery of the right to a jury trial and to defeat the just purposes of the act in that respect.

We conclude by quoting again the language of the Supreme Court in the International Coal Company case, after referring to what was said by that court in *Parsons vs. Railway*:

"Congress had not then and has not since, given any indication of an intent that persons not injured might nevertheless recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

Our opinion, therefore, already filed, with certain modifications in the text thereof, will stand as the opinion of the court in this regard.

For obvious reasons, we have made no distinction between the count for the recovery of damages for discriminatory rates and that for unreasonable rates, and therefore have not referred to the former in the plaintiff's petition, complaining of discrimina-
221 tions alleged to have been practiced by the plaintiff in error during the period from November, 1900, to August, 1901, although the counsel for defendants in error says in his brief at the rehearing: "There is a wide distinction between the two causes of action."

But it is argued that, inasmuch as, upon application of the plaintiff, a discrimination was found by the commission to have been practiced by the defendant, and reparation therefor awarded, in the amount of the difference between the tariff rate charged and the low rate collected from other shippers, that award was prima facie evidence of the damage sustained by the plaintiff. So that, according to this argument, even in rebate cases there is a class, consisting of those in which the commission has intervened and made an award to which the measure of damage established by section 8 for every violation of the law, does not apply.

Defendants in error also urge that this court was in error in its interpretation of the second paragraph of section 16 of the act, providing that "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

We have carefully reconsidered the opinion we have already expressed as to this provision of the sixteenth section of the act, in the light of the able argument of counsel for defendants in error. We are not convinced, however, that we have misconceived the true meaning and spirit of that provision, and therefore adhere to our judgment, that the court below was in error in instructing
222 the jury that "there is no statute of limitation which bars the recovery of the plaintiff for either of the amounts presented in this suit." The assignments of error in this respect, therefore, must be sustained, and for these reasons and those heretofore stated, the judgment below must be reversed, and a venire de novo awarded.

(Received and filed February 19, 1914. Saunders Lewis, Jr., Clerk.)

223 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1720 (List No. 71).

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and a venire de novo awarded.

(Signed)

JOHN B. McPHERSON,

Circuit Judge.

Philadelphia, February 19, 1914.

Endorsed: No. 1720. Order Reversing Judgment. Received & Filed Feb. 19, 1914. Saunders Lewis, Jr., Clerk.

224 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, act:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court in the case of Lehigh Valley Railroad Co., Plaintiff in Error, vs. Henry E. Meeker, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this tenth day of March, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,

Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

225 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit which Lehigh Valley Railroad Company is plaintiff in error and Henry E. Meeker is defendant in error, No. 1720, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should

be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States

227 [Endorsed:] File No. 24,152. Supreme Court of the United States, No. 1001, October Term, 1913. Henry E. Meeker vs. Lehigh Valley Railroad Company. Writ of Certiorari granted.

228 In the United States Circuit Court of Appeals for the Third Circuit.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

It is hereby agreed and stipulated between counsel for the plaintiff-in-error and the defendant-in-error in the above case, that the certified copy of the record therein from the Circuit Court of Appeals be presented to the Supreme Court with the petition for certiorari, and not be taken as a return to the writ of certiorari, instead of requiring the certification to the Supreme Court of another transcript of the record.

Dated at Philadelphia, Pa., this first day of May, 1914.

(Signed) By HENRY E. MEEKER,
WM. A. GLASGOW, JR., *Attorney*
LEHIGH VALLEY RAILROAD
COMPANY,

(Signed) By JOHN G. JOHNSON, *Attorney*,
Per J. W. BAYARD.

Endorsed: No. 1720. Stipulation. Received & Filed May 1914. Saunders Lewis, Jr., Clerk.

229 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, et:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed as to return to writ of certiorari to the Supreme Court of the United States, in the case of Henry E. Meeker, vs. Lehigh Valley Railroad Company, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this seventh day of May, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

230 [Endorsed:] File No. 24,152. Supreme Court U. S., October Term, 1914. Term No. 435. Henry E. Meeker, Petitioner, vs. Lehigh Valley Railroad Company. Writ of certiorari and return. Filed May 8, 1914.